

In the Supreme Court of Ohio

STATE OF OHIO ex rel. DOUGLAS PRADE,

Relator,

v.

NINTH DISTRICT COURT OF APPEALS

and

HONORABLE JUDGE CHRISTINE CROCE,

Respondents.

Case No. 16-0686

Original Action for
Writ of Prohibition

MERIT BRIEF OF RELATOR DOUGLAS PRADE

David Booth Alden* (Ohio Bar #6,143)

* Counsel of Record

Lisa B. Gates (Ohio Bar #40,392)

Emmett E. Robinson (Ohio Bar #88,537)

Matthew R. Cushing (Ohio Bar #92,674)

JONES DAY

North Point, 901 Lakeside Avenue

Cleveland, Ohio 44114

Tel: (216) 586-3939; Fax: (216) 579-0212

dbalden@jonesday.com

lgates@jonesday.com

Mark A. Godsey (Ohio Bar #74,484)

Brian C. Howe (Ohio Bar #86,517)

THE OHIO INNOCENCE PROJECT

University of Cincinnati College of Law

P.O. Box 201140

Cincinnati, Ohio 45220-0040

Tel: (513) 556-6805; Fax: (513) 556-2391

markgodsey@gmail.com

brianchurchhowe@gmail.com

Counsel for Relator Douglas Prade

Michael DeWine (Ohio Bar #9,181)

Ohio Attorney General

Tiffany L. Carwile* (Ohio Bar #82,522)

* Counsel of Record

Sarah Pierce (Ohio Bar #87,799)

Assistant Ohio Attorneys General

30 East Broad Street, 16th Floor

Columbus, Ohio 43215

Tel: (614) 466-2872; Fax: (614) 728-7592

tiffany.carwile@ohioattorneygeneral.gov

Counsel for Respondent

Ninth District Court of Appeals

Colleen M. Sims* (Ohio Bar #69,790)

* Counsel of Record

Heaven R. DiMartino (Ohio Bar #73,423)

Assistant Prosecuting Attorneys

53 University Avenue, 6th Floor

Akron, Ohio 44308

Tel: (330) 643-2788; Fax: (330) 643-8277

simscc@prosecutor.summitoh.net

Counsel for Respondent

Honorable Judge Christine Croce

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SUMMARY OF ARGUMENT

In 1998, Relator Douglas Prade, a former Akron Police Captain, was tried for the murder of his ex-wife, Dr. Margo Prade. Dr. Prade's killer bit her so hard that, through her lab coat and blouse, his teeth left a bite mark impression on her arm. DNA testing in 1998 found only Dr. Prade's DNA on the bite mark section of the lab coat and provided no information about the killer. The only physical evidence tying Mr. Prade to the crime scene was testimony purporting to link Mr. Prade's dentition to a picture of the killer's bite mark impression. This testimony was provided by the State's experts in bite mark identification, a "science" that now is widely questioned. Mr. Prade was convicted and sentenced to life in prison.

In 2012, new, more sensitive DNA testing methods found male DNA where the killer bit Dr. Prade, and there is no dispute that the male DNA was not Mr. Prade's. After reviewing the new DNA evidence, testimony from seven experts who testified over four days of hearings, and the trial record, Summit County Common Pleas Judge Judy Hunter was "firmly convinced that no reasonable juror would convict [Mr. Prade] for the crime of aggravated murder with a firearm" and "conclude[d] as a matter of law that [Mr. Prade] is actually innocent." (Order on Defendant's Petition for Post-Conviction Relief or Motion for New Trial at 21, *State v. Prade*, Summit County Common Pleas No. CR 1998-02-0463 (Jan. 29, 2013) (the "Exoneration Order") (Appendix at App-21) (hereafter cited as "App-")). Accordingly, Judge Hunter overturned his conviction for aggravated murder, Mr. Prade was released from prison, and he was free for eighteen months.

For the past two years, however, Mr. Prade again has been incarcerated for the very crime as to which Judge Hunter found that he is “actually innocent.” That is because the State erroneously was allowed to appeal from that decision in the Exoneration Order, and the Ninth District reversed it. Mr. Prade appears to be the only defendant in the history of the State to be incarcerated for a crime after a trial judge reviewed the evidence and determined that he was innocent. The only one.

The reason that no other defendant ever has been incarcerated under these circumstances is not hard to discern. Namely, it has been well established for decades that a trial court’s decision “grounded on a determination by the trial judge that the state produced insufficient evidence to convict” is a “final verdict” under R.C. 2945.67(A), and “R.C. 2945.67(A) prevents an appeal of *any* final verdict.” *State ex rel. Yates v. Court of Appeals for Montgomery Cty.*, 32 Ohio St.3d 30, 32, 512 N.E.2d 343 (1987) (emphasis in original). “[A] final verdict within the meaning of R.C. 2945.67(A) . . . is not appealable by the state as a *matter of right or by leave to appeal.*” *Id.* at 33 (emphasis added); *accord State v. Hampton*, 134 Ohio St.3d 447, 2012-Ohio-5688, 983 N.E.2d 324, ¶ 25; *State v. Keeton*, 18 Ohio St.3d 379, 481 N.E.2d 629 (1985), paragraph 2 of the syllabus. And, apart from this case, the State always has been barred from appealing, and appellate courts have been barred from reviewing, any and all “final verdict[s].”

* * *

This original action presents three issues for this Court’s consideration. The first is whether a writ of prohibition should issue when lower courts have acted or are about to act without subject matter jurisdiction. As this Court recently reiterated in *State ex rel.*

Ford v. Ruehlman, __ Ohio St.3d __, 2016-Ohio-3529, ___ N.E.3d ___, ¶¶ 61-62 (per curiam), the answer to that question is “yes.” A writ of prohibition is the appropriate vehicle for this Court to correct and restrain inferior courts’ actions when those courts lacked or lack subject matter jurisdiction.

The second question is whether Ohio’s appellate courts patently and unambiguously lack jurisdiction to hear appeals by the State that are not authorized by R.C. 2945.67(A). Again, the answer is “yes.” Ohio appellate courts’ jurisdiction is limited as provided by law, and this Court has, again and again, found that the State may appeal in criminal matters only as expressly authorized by R.C. 2945.67(A).

The third question is whether a trial court’s decision finding that a criminal defendant is actually innocent based on the insufficiency of the evidence and made in connection with granting a petition for postconviction relief is a “final verdict” that the State may not appeal under R.C. 2945.67(A). Once again, the answer is “yes” because, in this Court’s words, a trial court’s decision “that the state produced insufficient evidence to convict” is a “final verdict” under R.C. 2945.67(A), and “R.C. 2945.67(A) prevents an appeal of *any* final verdict,” whether “as a matter of right or by leave to appeal.” *Yates*, 32 Ohio St.3d at 32-33 (emphasis in original).

Respondents—the Ninth District Court of Appeals (the “Ninth District”) and Summit County Common Pleas Judge Christine Croce (“Judge Croce”)—will argue that, while it bars the State from appealing some “final verdict[s],” R.C. 2945.67(A)’s bar does not apply to decisions that the State may appeal “as a matter of right” under

R.C. 945.67(A), including decisions granting postconviction relief. Respondents' claim that R.C. 2945.67(A) is so limited, however, fails for many reasons.

First, it cannot be reconciled with this Court's decisions in, among other cases, *Yates*, 32 Ohio St.3d at 32-33, *Hampton*, 2012-Ohio-5688, at ¶ 25, and *Keeton*, 18 Ohio St.3d 379, at paragraph 2 of the syllabus. *Second*, Respondents' reading of the statute both ignores the rule that R.C. 2945.67(A) must be strictly construed against the State and is contrary to the principled interpretation this Court repeatedly has articulated. *Third*, there is absolutely no reason why the Legislature would have intended to bar appeals by the State from only some "final verdict[s]," while allowing appeals from others, and that result should be rejected because, among other things, it would permit constitutionally barred appeals. *Fourth*, if the Court were to adopt Respondents' interpretation of R.C. 2945.67(A), the statutory bar against the State appealing from "final verdict[s]" still would apply here because multiple "decision[s]" were subsumed within the Exoneration Order, and this Court has found that R.C. 2945.67(A) permits appeals from some "decision[s]" in an order while simultaneously barring any appeal from a decision that is a "final verdict."

This Court previously denied Respondents' motions to dismiss that squarely presented the third proposition of law above. The parties since have agreed on the relevant facts, none of which is disputed. (Agreed Statement of Facts ¶¶ 1-29 (App-58 to App-63)). Now, because the undisputed facts show that the Ninth District and Judge Croce acted and/or are acting without jurisdiction, the Court should issue the requested writs of prohibition.

STATEMENT OF FACTS

A. Dr. Prade's Murder, and Mr. Prade's Trial and Conviction

This original action seeking writs of prohibition relates to the November 27, 1997, murder of Dr. Margo Prade, who was fatally shot while parked in her van outside her Akron medical offices. *State v. Prade*, 126 Ohio St.3d 27, 2010-Ohio-1842, 930 N.E.2d 287, ¶ 2 (hereafter "*Prade I*"). Dr. Prade attempted to defend herself, and her killer bit her arm so hard that, through her lab coat and blouse, his teeth left a bite mark impression on her skin. *Id.* at ¶ 3. The killer's gun and car never were found.

In 1998, Akron Police Captain Douglas Prade, Dr. Prade's ex-husband, was arrested and charged with the aggravated murder of Dr. Prade. (Agreed Statement of Facts at ¶ 4 (App-59)). At Mr. Prade's September 1998 trial, the killer's bite mark was key evidence in the case. *Prade I*, 2010-Ohio-1842, at ¶ 3. One of the State's bite mark identification experts testified that the bite mark on her arm was "made by" Mr. Prade and another testified that it was "consistent with" Mr. Prade's dentition. *Id.* The bite mark area on Dr. Prade's lab coat was described at trial by the State's FBI forensic testing expert as "the best possible source of DNA evidence as to the killer's identity." *Id.* at ¶ 17. But, due to technological limitations, DNA testing in 1998 could not detect DNA from Dr. Prade's killer within the large amount of Dr. Prade's blood that soaked the bite mark portion of the lab coat. *Id.* at ¶ 18.

B. The New DNA Testing and Mr. Prade's Exoneration

Since Mr. Prade's 1998 trial, there have been major advances in DNA testing technology, including the development of Y-STR DNA testing technology that can detect

even small amounts of male DNA within large quantities of female DNA. *Id.* at ¶¶ 20-21. Seeking to have these new DNA testing methods applied to the evidence in this case, Mr. Prade filed an application for new DNA testing pursuant to Chapter 2953 of the Ohio Revised Code on February 5, 2008. (Agreed Statement of Facts at ¶ 6 (App-59)). The State opposed Mr. Prade's application, the trial court denied it, the Ninth District affirmed, and this Court later reversed. (Agreed Statement of Facts at ¶¶ 7-9 (App-59)); *see also State v. Prade*, 9th Dist. Summit No. 24296, 2009-Ohio-704, *rev'd*, 126 Ohio St.3d 27, 2010-Ohio-1842, 930 N.E.2d 287.

After remand, Dr. Prade's lab coat, including the bite mark section, was tested using the new DNA testing technology. The results of that testing revealed for the first time that:

- (1) there was male DNA on Dr. Prade's lab coat where her killer bit her;
- (2) Mr. Prade was definitively excluded as the source of the male DNA on the bite mark section of the lab coat; and
- (3) in all four other locations on the lab coat that were tested to see if the lab coat was contaminated with stray male DNA, no male DNA was found.

(Exoneration Order at 7-9 (App-7 to App-9)).

Summit County Common Pleas Judge Judy Hunter then held a four-day evidentiary hearing at which she heard testimony from four DNA testing experts (two called by the defense and two by the State), two experts in bite mark identification (one called by the defense and one by the State), and a defense expert on the reliability of eyewitness identification. (Agreed Statement of Facts at ¶ 12 (App-60); Exoneration

Order at 7, 10, 15 (App-7, App-10, App-15)). Based on the evidence presented at the hearing, as well as her review of the trial record, Judge Hunter was “firmly convinced that no reasonable juror would convict [Mr. Prade] for the crime of aggravated murder with a firearm” and “conclude[d] as a matter of law that [Mr. Prade] is actually innocent of aggravated murder.” (Exoneration Order at 21 (App-21)). Accordingly, Judge Hunter granted the petition for postconviction relief, “overturn[ed Mr. Prade]’s convictions for aggravated murder with a firearms specification,” ordered that Mr. Prade “be discharged from prison forthwith,” and, in the alternative, granted Mr. Prade’s new trial motion. *Id.* at 21, 24 (App-21, App-24).

C. The State’s Improper Appeal and Subsequent Events

Although the Exoneration Order included a decision “grounded on a determination . . . by the trial judge that the state produced insufficient evidence to convict” (*Yates*, 32 Ohio St.3d at 32)—a decision that was a “final verdict” from which, under R.C. 2945.67(A), the State could not appeal under a raft of this Court’s rulings—the State appealed the grant of postconviction relief in the Exoneration Order, including the decision finding actual innocence based on the insufficiency of the evidence. (Agreed Statement of Facts at ¶ 15 (App-60); *see also* Notice of Appeal, *State v. Prade*, 9th Dist. Summit No. 26775 (Jan. 29, 2013) (App-27)). In that appeal, the Respondent Ninth District Court of Appeals reversed. (Agreed Statement of Facts at ¶ 16 (App-61)); *see also State v. Prade*, 2014-Ohio-1035, 9 N.E.3d 1072 (9th Dist.), *appeal not accepted*, 139 Ohio St.3d 1483, 2014-Ohio-3195, 12 N.E.3d 1229.

Because the Ninth District improperly reviewed and reversed Judge Hunter's decision finding Mr. Prade innocent based on the insufficiency of the evidence, three significant events took place that, but for that reversal, would not have occurred. First, Summit County Common Pleas Judge Christine Croce, who replaced the now-retired Judge Hunter, ordered that Mr. Prade be reincarcerated on July 25, 2014, and Mr. Prade remains imprisoned to this day. (Agreed Statement of Facts at ¶¶ 23-24 (App-62)). Second, Judge Croce reconsidered Judge Hunter's alternative ruling in the Exoneration Order granting Mr. Prade a new trial and denied the motion. (Agreed Statement of Facts at ¶ 27 (App-62); *see also* Order On Defendant's Motion For New Trial, *State v. Prade*, Summit County Common Pleas No. CR 1998-02-0463 (Mar. 11, 2016) (App-37 to App-54)). Third, Mr. Prade appealed from Judge Croce's order denying his motion for a new trial in an appeal that now is pending before the Ninth District Court of Appeals. (Agreed Statement of Facts at ¶ 28 (App-62); *see also* Notice of Appeal, *State v. Prade*, 9th Dist. Summit No. 28193 (Apr. 7, 2016) (App-55)).

ARGUMENT

I. RELATOR'S PROPOSITION OF LAW NO. 1:

A WRIT OF PROHIBITION SHOULD ISSUE WHEN LOWER COURTS ACT WITHOUT SUBJECT MATTER JURISDICTION.

A. **A Writ Of Prohibition Is The Appropriate Vehicle For Correcting The Lower Courts' Jurisdictionally Unauthorized Actions.**

A writ of prohibition is the appropriate vehicle for this Court to correct both the jurisdictionally unauthorized actions of an appellate court in allowing the State to take an appeal barred by R.C. 2945.67(A) and the unauthorized subsequent actions of a trial court

flowing therefrom. A writ of prohibition should issue when, as here, lower courts purport to exercise jurisdiction over attempts by the State to appeal decisions that are not appealable under R.C. 2945.67(A). *See, e.g., State ex rel. Steffen v. Court of Appeals, First Appellate Dist.*, 126 Ohio St.3d 405, 2010-Ohio-2430, 934 N.E.2d 906 (writ granted when, under R.C. 2945.67(A), there was no right to appeal trial court’s decision to grant a new penalty-phase trial and any attempt to appeal by leave was untimely); *State ex rel. Yates v. Court of Appeals for Montgomery Cty.*, 32 Ohio St.3d 30, 31, 512 N.E.2d 343 (1987) (writ granted when there could be no appeal of a final verdict under R.C. 2945.67(A)).

A writ of prohibition may issue not only to prevent future jurisdictionally unauthorized actions, but also to correct past ones and “restore the parties to the same position they occupied before the [lower court’s jurisdictional] excesses occurred.” *State ex rel. Lomaz v. Court of Common Pleas of Portage Cty.*, 36 Ohio St.3d 209, 212, 522 N.E.2d 551 (1988) (quoting *State ex rel. Adams v. Gusweiler*, 30 Ohio St.2d 326, 330, 285 N.E.2d 22 (1972)). That is because the writ of prohibition concerns itself only with the lower court’s subject matter jurisdiction, without which the lower court’s actions are void. *State ex rel. Tubbs Jones v. Suster*, 84 Ohio St.3d 70, 75, 701 N.E.2d 1002 (1998).

“There are three elements necessary for a writ of prohibition to issue: the exercise of judicial power, the lack of authority for the exercise of that power, and the lack of an adequate remedy in the ordinary course of law.” *State ex rel. Ford v. Ruehlman*, ___ Ohio St.3d ___, 2016-Ohio-3529, ___ N.E.3d ___, ¶ 61 (per curiam) (citations omitted). “If the absence of jurisdiction is patent and unambiguous,” then the relator need not

“establish the third prong, the lack of an adequate remedy at law.” *Id.* at ¶ 62 (citing *State ex rel. Sapp v. Franklin Cty. Court of Appeals*, 118 Ohio St.3d 368, 2008-Ohio-2637, 889 N.E.2d 500, ¶ 15).

Here, it is undisputed that Respondents have exercised, and continue to exercise, judicial power with respect to Mr. Prade. Thus, if Mr. Prade can show that Respondents patently and unambiguously lack jurisdiction, a writ should issue. And, as demonstrated below in Propositions 2 and 3, Mr. Prade has made such a showing. More specifically, because the Judge Hunter found Mr. Prade actually innocent based on the insufficiency of the evidence and exonerated him, that decision in the Exoneration Order was a “final verdict” for purposes of R.C. 2945.67(A). Therefore, the Ninth District patently and unambiguously lacked subject matter jurisdiction over the State’s appeal from that order, and Judge Croce patently and unambiguously lacked subject matter jurisdiction to order that Mr. Prade be incarcerated.

B. Subject Matter Jurisdiction Cannot Be Waived.

A defect in a court’s subject matter jurisdiction cannot be waived because subject matter jurisdiction “is a ‘condition precedent to the court’s ability to hear the case’” and thus “may be challenged at any time.” *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992, ¶ 11 (citations omitted). Actions by a court without subject matter jurisdiction are void *ab initio*, *Tubbs Jones*, 84 Ohio St.3d at 75, and “[i]t is as though such proceedings had never occurred . . . and the parties are in the same position as if there had been no” such proceedings. *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, 909 N.E.2d 1254, ¶ 27 (citations omitted); *see also State ex rel. Mayer v. Henson*,

97 Ohio St.3d 276, 2002-Ohio-6323, 779 N.E.2d 223, ¶ 12 (the writ can be used “to correct the results of prior jurisdictionally unauthorized actions”). Thus, whether a direct appeal was taken that failed to address the court’s jurisdiction “is immaterial.” *State ex rel. Willacy v. Smith*, 78 Ohio St.3d 47, 51, 676 N.E.2d 109 (1997).

As this Court observed in *Gates Mills Investment Co. v. Parks*, 25 Ohio St.2d 16, 19-20, 266 N.E.2d 552 (1971), “[t]he failure of a litigant to object to subject-matter jurisdiction at the first opportunity . . . does not give rise to a theory of waiver.” Indeed, this Court has held that the subject matter jurisdiction of a court of appeals considering a criminal appeal by the State under R.C. 2945.67(A) may be attacked collaterally—and even then, may be raised *sua sponte* by the court when the defendant fails to brief the issue. *See State v. Lomax*, 96 Ohio St.3d 318, 2002-Ohio-4453, 774 N.E.2d 249, ¶¶ 16-17.

II. RELATOR’S PROPOSITION OF LAW NO. 2:

AN APPELLATE COURT “PATENTLY AND UNAMBIGUOUSLY” LACKS JURISDICTION OVER CRIMINAL APPEALS TAKEN BY THE STATE THAT ARE NOT AUTHORIZED BY R.C. 2945.67(A).

Ohio’s appellate courts lack jurisdiction to hear appeals by the State in criminal matters unless authorized by R.C. 2945.67(A). (App-66). The Ohio Constitution provides that the State’s appellate courts have only “such jurisdiction as may be provided by law.” Ohio Constitution, Article IV, § 3(B)(2) (App-71). In criminal matters, appellate courts’ jurisdiction over appeals by the State is both created and limited by R.C. 2945.67(A) because “the state has no absolute right of appeal in a criminal matter unless specifically granted such right by statute.” *State v. Fisher*, 35 Ohio St.3d 22, 24,

517 N.E.2d 911 (1988). R.C. 2945.67(A) provides that, with respect to trial-court decisions in criminal cases, the State:

may appeal as a matter of right any decision . . . grant[ing] a motion to dismiss all or any part of an indictment, complaint, or information, a motion to suppress evidence, or a motion for the return of seized property or grant[ing] post conviction relief . . . , and may appeal by leave . . . any other decision, except the final verdict.

R.C. 2945.67(A) (full text at App-66).

Although other, more general statutes may appear to provide that certain orders are final judgments that may be appealed by any party, “[a]bsent R.C. 2945.67, the state has no substantive right to appeal trial-court decisions in criminal cases.” *In re M.M.*, 135 Ohio St.3d 375, 2013-Ohio-1495, 987 N.E.2d 652, ¶ 22 (footnote and citation omitted). For example, in *Steffen* this Court found that “[w]hile R.C. 2505.03 [App-65] generally provides that every final order or judgment may be reviewed on appeal, R.C. 2945.67(A) specifically governs appeals by the state in criminal and juvenile delinquency proceedings.” *Steffen*, 2010-Ohio-2430, ¶ 21 (quoting *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, 897 N.E.2d 629, ¶ 30); *see also State v. Matthews*, 81 Ohio St.3d 375, 378, 691 N.E.2d 1041 (1998) (same); *Fisher*, 35 Ohio St.3d at 24 (now-repealed R.C. 2953.05’s general grant of a right to appeal “did not grant a right of appeal to the state,” which was required to appeal under R.C. 2945.67(A)).

Similarly, while the postconviction relief statute appears at first glance to provide both the State and defendants an unlimited right to appeal in R.C. 2953.23(B),¹ this Court observed in *Fisher*, 35 Ohio St.3d at 25, that the postconviction relief provisions were “expressly designed to allow *defendants* to appeal from convictions that are defective.” (Emphasis added). If there were doubt as to whether R.C. 2945.67(A) limits appeals by the State from decisions granting petitions for postconviction relief, it would be removed by R.C. 2945.67(A)’s express language, which includes decisions granting postconviction relief among the types of decisions that are subject to the statute. R.C. 2945.67(A) (addressing appeals from decisions “grant[ing] post conviction relief pursuant to sections 2953.21 to 2953.24 of the Revised Code”) (App-66).

Thus, Ohio’s appellate courts patently and unambiguously lack jurisdiction to hear criminal appeals by the State that are not authorized by R.C. 2945.67(A). *Steffen*, 2010-Ohio-2430, at ¶ 21; *Matthews*, 81 Ohio St.3d at 378; *Fisher*, 35 Ohio St.3d at 24.

¹ R.C. 2953.23(B) provides:

An order awarding or denying relief sought in a petition filed pursuant to section 2953.21 of the Revised Code is a final judgment and may be appealed pursuant to Chapter 2953 of the Revised Code.

(App-68).

III. RELATOR’S PROPOSITION OF LAW NO. 3:

IF A TRIAL JUDGE’S POST-CONVICTION RELIEF RULING INCLUDES A DECISION THAT A DEFENDANT IS ACTUALLY INNOCENT BASED ON THE INSUFFICIENCY OF THE EVIDENCE, THAT DECISION IS A “FINAL VERDICT” THAT THE STATE CANNOT APPEAL.

Judge Hunter’s decision in the Exoneration Order finding Mr. Prade actually innocent based on the insufficiency of the evidence was a “final verdict” under R.C. 2945.67(A), and “R.C. 2945.67(A) prevents an appeal of *any* final verdict.” *Yates*, 32 Ohio St.3d at 32 (emphasis in original). Accordingly, this Court should issue writs of prohibition to correct the lower courts’ extra-jurisdictional actions.

A. Judge Hunter’s Decision In The Exoneration Order Finding Mr. Prade Actually Innocent Based On The Insufficiency Of The Evidence Was A “Final Verdict” Under R.C. 2945.67(A).

Under this Court’s longstanding precedent, Judge Hunter’s decision in the Exoneration Order finding Mr. Prade actually innocent based on the insufficiency of the evidence and overturning his conviction was a “final verdict” under R.C. 2945.67(A). It is well established that “final verdict[s]” under R.C. 2945.67(A) include not only jury verdicts, but also trial courts’ “factual determination[s] of innocence” that are “grounded upon insufficiency of [the] evidence.” *Yates*, 32 Ohio St.3d at 32-33, 36; *accord State v. Hampton*, 134 Ohio St.3d 447, 2012-Ohio-5688, 983 N.E.2d 324, ¶ 25; *Lomax*, 2002-Ohio-4453, at ¶ 23; *State v. Bistricky*, 51 Ohio St.3d 157, 158, 555 N.E.2d 644 (1990); *State v. Keeton*, 18 Ohio St.3d 379, 481 N.E.2d 629 (1985), paragraph 2 of the syllabus. That is because this Court always has determined whether a trial court’s order constitutes a “final verdict” under R.C. 2945.67(A) based on “the type of relief” granted by the order,

rather than its form. *State v. Davidson*, 17 Ohio St.3d 132, 135, 477 N.E.2d 1141 (1985).
“Any other result would improperly elevate form over substance.” *Id.*

Here, Judge Hunter, after being provided with the new DNA test results definitively excluding Mr. Prade from the male DNA found over the killer’s bite mark, conducted a four-day evidentiary hearing with testimony from seven expert witnesses and reviewed the voluminous trial record. (Exoneration Order at 7-18 (App-7 to App-18)). Based on her comprehensive review, Judge Hunter was “firmly convinced that no reasonable juror would convict [Mr. Prade] for the crime of aggravated murder with a firearm,” “conclude[d] as a matter of law that [Mr. Prade] is actually innocent of aggravated murder,” “overturn[ed Mr. Prade’s] convictions for aggravated murder with a firearms specification,” and ordered that he “be discharged from prison forthwith.” (*Id.* at 21 (App-21)).

Despite its different form, Judge Hunter’s decision in the Exoneration Order finding Mr. Prade actually innocent based on the insufficiency of the evidence and overturning his aggravated murder conviction is, in substance, indistinguishable from the directed verdicts of acquittal in *Hampton*, *Lomax*, *Bistricky*, *Yates*, and *Keeton*. And substance, not form, is what controls. *Davidson*, 17 Ohio St.3d at 135. Like the directed judgments of acquittal in those cases, Judge Hunter’s decision finding Mr. Prade actually innocent based on the insufficiency of the evidence is a “final verdict” under R.C. 2945.67(A).

B. “R.C. 2945.67(A) Prevents An Appeal Of *Any* Final Verdict.” *Yates*, 32 Ohio St.3d at 32 (emphasis in original).

In the Exoneration Order, Judge Hunter granted a petition for postconviction relief—a category of decision from which the State may appeal “as a matter of right” under R.C. 2945.67(A). (App-66). According to Respondents, R.C. 2945.67(A)’s prohibition on the State appealing from “final verdict[s]” does not apply here because the appeal at issue was “as a matter of right,” rather than “by leave.” As discussed below, however, that claim is wrong because it (1) cannot be reconciled with multiple, on-point rulings from this and other courts, (2) misreads R.C. 2945.67(A), and (3) lacks any supporting basis in logic or public policy. Further, if the Court were to adopt Respondents’ interpretation of R.C. 2945.67(A), the statutory bar against the State appealing from “final verdict[s]” still would apply here because the “final verdict” of actual innocence was only one of multiple “decision[s]” subsumed within the Exoneration Order, and this Court has found that R.C. 2945.67(A) permits appeals from other “decision[s]” (*e.g.*, evidentiary rulings) while simultaneously barring any appeal from an underlying “final verdict.”

1. This Court Repeatedly Has Found, Without Qualification, That R.C. 2945.67(A) Bars The State From Appealing All “Final Verdict[s].”

“R.C. 2945.67(A) prevents an appeal of *any* final verdict.” *Yates*, 32 Ohio St.3d at 32 (emphasis in original). Whether the appeal of a “final verdict” is “as a matter of right” or “by leave” is of no consequence because a “final verdict within the meaning of R.C. 2945.67(A) . . . is not appealable by the state as a matter of right or by leave to appeal pursuant to that statute.” *Yates*, 32 Ohio St.3d at 33 (emphasis added). In *Lomax*,

this Court found it to be “clear that the state may not appeal, even by leave of court, an order that is the ‘final verdict’ in the case.” *Lomax*, 2002-Ohio-4453, at ¶ 22. And in *Keeton*, this Court observed that “[a] directed verdict of acquittal . . . is a ‘final verdict’ within the meaning of R.C. 2945.67(A) which *is not appealable by the state as a matter of right* or by leave to appeal pursuant to that statute.” *Keeton*, 18 Ohio St.3d 379, paragraph 2 of the syllabus (emphasis added).

This Court could not have been clearer in stating, again and again, that a “final verdict” is not appealable “as a matter of right” or otherwise. None of this Court’s many statements was tied to or limited by particular facts or circumstances. Nonetheless, Respondents can be expected to ask this Court to ignore its many prior rulings that the State cannot appeal from final verdicts. They likely will argue that the appeals in those cases were not taken “as a matter of right” and, thus, are distinguishable from the case at hand. But that is incorrect.

For example, *State v. Fraternal Order of Eagles Aerie 0337 Buckeye*, 58 Ohio St.3d 166, 569 N.E.2d 478 (1991), involved a single order entered during trial that granted a motion to suppress—one of the four types of orders that R.C. 2945.67(A) allows the State to appeal “as a matter of right”—and also acquitted the defendant for lack of sufficient evidence to convict. There, although this Court allowed the State to appeal the ruling on the motion to suppress “as a matter of right,” it would “not set aside the judgment of acquittal.” *Fraternal Order of Eagles*, 58 Ohio St.3d at 168. That is exactly what the appellate court should have done here: allowed the State to appeal “as a matter of right” from evidentiary, legal, and other decisions underlying the grant of the

petition for postconviction relief, but barred the State from appealing the “final verdict”—Judge Hunter’s decision overturning Mr. Prade’s conviction based on her finding that he is actually innocent due to the insufficiency of the evidence.

Significantly, this Court noted in *Fraternal Order of Eagles* that the State had “an absolute right to appeal the grant of a motion to suppress” entered after trial has begun and observed that the trial court improperly “abolished” that right “by the entry of a judgment of acquittal.” *Fraternal Order of Eagles*, 58 Ohio St.3d at 169. Nonetheless, and even though the trial court judge improperly entered the acquittal, this Court still barred the State from appealing the acquittal. *Id.*; *accord State v. Ross*, 128 Ohio St.3d 283, 2010-Ohio-6282, 943 N.E.2d 992, ¶¶ 48, 51 (refusing to review or reverse trial court’s acquittal where the underlying “motion [for acquittal] was not properly before the trial court and should have been denied”). Thus, the State’s “absolute right” to appeal was subject to and limited by the bar against the State appealing from “final verdict[s].”

Further, lower courts have followed this Court’s approach in *Fraternal Order of Eagles*. For example, in both *In re D.R.*, 8th Dist. Cuyahoga Nos. 100034 & 100035, 2014-Ohio-832, and *In re N.I.*, 191 Ohio App.3d 97, 2010-Ohio-5791, 944 N.E.2d 1214 (8th Dist), (1) juvenile courts granted motions to suppress—one of the four types of decisions from which the State has an “as a matter of right” appeal under R.C. 2945.67(A)—and acquitted, and (2) appellate courts then barred appeals from the acquittals.

Respondents’ reading of R.C. 2945.67(A) also would require the Court to ignore its ruling in *Hampton*, 2012-Ohio-5688. There, it became apparent during trial that the

crime occurred in a county other than the one specified in the indictment, which meant that venue was improper and led the trial court to enter a directed judgment of acquittal. *Id.* at ¶ 5. The State appealed both as a matter of right and by leave, and the Tenth District dismissed the appeal as of right and denied leave to appeal. *Id.* at ¶ 6. This Court concluded that “[a] court order purporting to acquit a defendant due to the state’s failure to establish venue is a ‘final verdict’ as that term is used in R.C. 2945.67(A), and *therefore the state may not appeal as of right from the order,*” and then affirmed “the judgment of the appellate court denying the state’s motion for leave to appeal *and dismissing the appeal of right.*” *Id.* at ¶ 25 (emphasis added).

Thus, *Fraternal Order of Eagles, Hampton, In re D.R.*, and *In re N.I.* all involved “as a matter of right” appeals and, as such, are indistinguishable from this case. Those cases stand for the proposition that the State cannot appeal from the “final verdict” aspect of a judgment, even when the procedural vehicle resulting in the “final verdict” is one from which, under R.C. 2945.67(A), the State typically can appeal “as a matter of right.”

2. R.C. 2945.67(A)’s Text Bars Appeals From All “Final Verdict[s],” Including In Appeals Taken “As A Matter Of Right.”

As detailed below at page 20, the starting point for reading and interpreting R.C. 2945.67(A) is that, because it is an exception to the general rule that the State cannot appeal in criminal matters, it must be strictly construed against the State. Further, and consistent with this Court’s repeated findings that R.C. 2945.67(A) bars the State from appealing all “final verdict[s],” the statutory language bars such appeals when, as here, the underlying appeal is “as a matter of right.” (*See* discussion below at pages 21 to 26).

a. R.C. 2945.67(A) must be strictly construed against the State.

For over one hundred years, “it has been well established that the state may not prosecute error in criminal cases, absent a grant of express authority to do so.” *State v. Brennehan*, 36 Ohio St.2d 45, 46, 303 N.E.2d 873 (1973); *see also Butler v. Jordan*, 92 Ohio St.3d 354, 357, 750 N.E.2d 554 (2001) (“‘Expressly’ means ‘in direct or unmistakable terms: in an express manner: *explicitly, definitely, directly.*’” (quoting *Webster’s Third New International Dictionary* (1986)) (*Butler* court’s emphasis)). Because provisions granting the State the right to appeal in criminal matters are “exception[s] to the general rule prohibiting appeals by the state in criminal prosecutions,” they “must be strictly construed.” *State v. Bassham*, 94 Ohio St.3d 269, 271, 762 N.E.2d 963 (2002) (citing *State v. Caltrider*, 43 Ohio St.2d 157, 331 N.E.2d 710 (1975), paragraph 1 of the syllabus).

As the Seventh District recently observed in *State v. Rucci*, 7th Dist. Mahoning No. 13 MA 65-72, 2014-Ohio-1396, ¶ 1, “[t]he General Assembly has made the public policy determination that the State has very limited appeal rights in criminal proceedings; moreover, those rules are to be strictly construed against the State.” *Accord State v. Powers*, 10th Dist. Franklin No. 15AP-422, 2015-Ohio-5124, ¶ 21, *appeal not allowed*, 145 Ohio St.3d 1459, 2016-Ohio-2807, 49 N.E.3d 321; *State v. Snowden*, 11th Dist. Ashtabula No. 2008-A-0014, 2008-Ohio-6554, ¶ 29, *appeal not allowed*, 121 Ohio St.3d 1441, 2009-Ohio-1638, 903 N.E.2d 1224. Thus, the starting point for reading and interpreting R.C. 2945.67(A) is that it must be strictly construed against the State.

b. R.C. 2945.67(A)'s text bars appeals from all "final verdict[s]," including when the underlying appeal is "as a matter of right."

R.C. 2945.67(A) provides that, with respect to trial-court rulings in criminal cases, the State "may appeal as a matter of right any decision . . . grant[ing] a motion to dismiss . . . an indictment . . . , a motion to suppress evidence, or a motion for the return of seized property or grant[ing] post conviction relief . . . , and may appeal by leave . . . any other decision, except the final verdict." (App-66). The question here is whether R.C. 2945.67(A), when read against the backdrop that exceptions to the prohibition against the State taking appeals in criminal matters must be strictly construed against the State, bars review of a "final verdict" in an appeal taken "as a matter of right." The answer is that it does.

Initially, it is important to note that there is no tension between, on the one hand, the State having an "as a matter of right" appeal and, on the other, the State being barred from appealing a "final verdict" within such an appeal. That is because, as regularly occurs in appeals from directed verdicts of acquittal, the State may appeal decisions underlying the "final verdict," but not the "final verdict" itself. *See, e.g., Ross*, 2010-Ohio-6282, at ¶ 51; *Bistricky*, 51 Ohio St.3d at 159; *State v. Arnett*, 22 Ohio St.3d 186, 188, 489 N.E.2d 284 (1986); *Keeton*, 18 Ohio St.3d at 381.

Respondents previously argued that reading R.C. 2945.67(A)'s bar against the State appealing from "final verdict[s]" to apply to appeals "as a matter of right" would improperly "add language" to R.C. 2945.67(A). (9th Dist. Motion to Dismiss at 5). That is not so. It simply requires reading the "except the final verdict" modifier to apply to

both antecedents—appeals as a matter of right and appeals by leave—consistent with clear precedent from this Court. Not a single syllable is added or subtracted from the statute.

Respondents also relied on unspecified “rules of grammar” to argue that the “except the final verdict” language applies only to appeals by leave. (9th Dist. Motion to Dismiss at 5). This, too, is incorrect. “A qualifying phrase separated from antecedents by a comma is evidence that the qualifier is supposed to apply to all the antecedents instead of only to the immediately preceding one.” 2A Norman Singer & Shambie Singer, *Sutherland Statutes and Statutory Construction* § 47:33 (7th ed. Westlaw 2015) (hereafter “*Sutherland*”); accord *Davis v. Devanlay Retail Group, Inc.*, 785 F.3d 359, 364 n.2 (9th Cir. 2015) (same); *AIG, Inc. v. Bank of Am. Corp.*, 712 F.3d 775, 782 (2d Cir. 2013) (same). This rule of statutory construction applies here because the qualifying phrase—“except the final verdict”—is separated from the two antecedents (*i.e.*, appeals as of right and appeals by leave) by a comma.

Moreover, “where the sense of the entire act requires that a qualifying word or phrase apply to several preceding or even succeeding sections, the qualifying word or phrase is not restricted to its immediate antecedent.” *Sutherland* § 47:33. For example, this Court declined to limit the application of a clause to the immediately preceding one in *Wohl v. Swinney*, 118 Ohio St.3d 277, 2008-Ohio-2334, 888 N.E.2d 1062. There, the issue was the scope of an insurance policy that defined “insured” for purposes of uninsured motorists coverage as follows:

1. You or any family member.
2. Any other person occupying your covered auto who is not [i] a named insured or [ii] an insured family member [iii] for uninsured motorists coverage under another policy.

Id. at ¶¶ 8-9 (bracketed numbering and underlining added) (bolding omitted). The lower court had found that clause [iii] above applied to only the one immediately before it—clause [ii]—rather than to both clauses [i] and [ii]. Reversing, this Court observed that, “[w]hen the . . . policy . . . is viewed as a whole, it becomes clear that the intention of the parties was to narrowly define ‘insured’” and, thus, the final clause [iii] applied to both preceding ones—clauses [i] and [ii]. *Wohl*, 2008-Ohio-2334, at ¶ 14.

Similarly, this Court declined to restrict application of final, modifying phrases to the clauses that immediately preceded them in *Moore v. State Automobile Mutual Insurance Co.*, 88 Ohio St.3d 27, 30-31, 723 N.E.2d 97 (2000). There, an earlier version of R.C. 3937.18(A) was at issue that provided:

No automobile liability . . . policy of insurance . . . shall be delivered or issued for the delivery in this state . . . unless both of the following coverages are provided to persons insured under the policy for [i] loss [ii] due to bodily injury or death [iii] suffered by such persons:

- (1) Uninsured motorist coverage, which . . . shall provide protection for bodily injury or death . . . , for the protection of persons insured thereunder who are legally entitled to recover [a] damages from owners or operators of uninsured motor vehicles [b] because of bodily injury, sickness, or disease, including death, [c] suffered by any person insured under the policy.

Am.Sub.S.B. No. 20, 145 Ohio Laws, Part I, 204, 210 (bracketed lettering and underlining added) (full text at App-74). The lower court found that clauses [iii] and [c] above applied only to the clauses immediately before them—clauses [ii] and [b], respectively—rather than to the earlier clauses as well (respectively, clauses [i] and [a]). This Court, after noting that R.C. 3937.18 was a remedial statute that should be read so as to protect against losses resulting from damages caused by uninsured motorists, reversed because the interpretation of the statute applying clauses [iii] and [c] only to the clauses immediately before them “would thwart the underlying purpose of uninsured motorist insurance.” *Moore*, 88 Ohio St.3d at 31.

As this Court did in *Wohl* and *Moore*, other courts regularly find that a modifier applies to all items in a series when, as here, that is the natural or logical result. For example, in *Paroline v. United States*, ___ U.S. ___, 134 S.Ct. 1710, 188 L.Ed.2d 714 (2014), the Court interpreted 18 U.S.C. § 2259(b), which provides for restitution to victims of child pornography and states in relevant part:

(3) Definition.—For purposes of this subsection, the term “full amount of the victim’s losses” includes any costs incurred by the victim for—

(A) medical services relating to physical, psychiatric, or psychological care;

(B) physical and occupational therapy or rehabilitation;

(C) necessary transportation, temporary housing, and child care expenses;

(D) lost income;

(E) attorneys’ fees, as well as other costs incurred; and

(F) any other losses suffered by the victim *as a proximate result of the offense*.

(Emphasis added) (full text at App-80). In the decision below, the Fifth Circuit had found that the proximate cause requirement does not apply to subparagraphs (A) through (E) of § 2259(b)(3) and, instead, that it applies only to the subparagraph in which it appeared—subparagraph (F).

Reversing, the Court found that the statutory proximate cause requirement applies not only to the subparagraph in which it appears—subparagraph (F)—but that it also applies to the other, separately lettered subparagraphs (A) to (E). *Paroline*, 134 S.Ct. at 1721. Explaining, the *Paroline* Court observed that, “[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all.” *Id.* (quoting *Porto Rico Ry., Light & Power Co. v. Mor*, 253 U.S. 345, 348, 40 S.Ct. 516, 64 L.Ed. 944 (1920)). The Court also noted that “[r]eading the statute to impose a general proximate-cause limitation accords with common sense.” *Id.*²

² Similarly, in *United States v. Bass*, 404 U.S. 336, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971), the Court interpreted now-repealed 18 U.S.C. § 1202(a), which made it a criminal offense for, among others, aliens who were in the United States unlawfully to “receive[], possess[], or transport[s] [firearms] *in commerce or affecting commerce*.” (Emphasis added) (full text at App-78). There, “[t]he critical textual question [wa]s whether the statutory phrase ‘in commerce or affecting commerce’ applie[d] to ‘possesses’ and ‘receives’ as well as to ‘transports.’” 404 U.S. at 339. The Court found that, “[s]ince ‘in commerce or affecting commerce’ undeniably applies to at least one antecedent, and since it makes sense with all three, the more plausible construction here is that it in fact applies to all three.” *Id.* at 339-40; *see also In re Federal-Mogul Global, Inc.*, 684 F.3d 355, 372 n.25 (3d Cir. 2012) (interpreting 11 U.S.C. § 1142(a), which provides in part that “[n]otwithstanding any . . . nonbankruptcy law, rule, or regulation *relating to*

Here, as with the statutes at issue in *Wohl, Moore, and Paroline*, R.C. 2945.67(A)'s bar against the State appealing from "final verdict[s]" is "applicable as much to the first and other words as to the last" and, thus, "the natural construction of the language demands that the clause be read as applicable" to the entire statute. Moreover, both the rule that R.C. 2945.67(A) must be strictly construed against the State and "common sense" weigh heavily against interpreting R.C. 2945.67(A) to allow the State to appeal from "final verdict[s]" in some instances (*i.e.*, appeals taken "as a matter of right") but not in others (*i.e.*, appeals taken "by leave").

3. Failure To Apply R.C. 2945.67(A)'s Bar Against The State Appealing From "Final Verdict[s]" In Appeals "As A Matter Of Right" Has No Supporting Policy Justification And Would Authorize Unconstitutional Appeals.

In their motions to dismiss, Respondents did not even attempt to explain why, as they contend, the Legislature may have sought to permit appeals from some "final verdict[s]," while barring appeals from others. Their silence on this point is not hard to explain; namely, there is absolutely no reason why the Legislature would have permitted the State to appeal from "final verdict[s]" underlying the four types of orders from which R.C. 2945.67(A) allows the State to appeal "as a matter of right," while barring appeals from "final verdict[s]" underlying "any other decision." To be sure, "final verdict[s]"

(continued...)

financial condition, the debtor . . . shall carry out the plan" (emphasis added) (full text at App-77); rejecting lower court's conclusion that "relating to financial condition" applies only to "regulation[s]" and finding that it also applies to "law[s]" and "rule[s]").

connected with the four types of appeals the State may pursue “as of right” are exceedingly rare. But as seen in *Fraternal Order of Eagles, In re D.R., In re N.I.*, and the instant case, they occur.

Separately, and although R.C. 2945.67(A)’s “final verdict” limitation extends beyond the limits of the double jeopardy provisions in the Ohio Constitution and the United States Constitution, *see Yates*, 32 Ohio St.3d at 32 (“R.C. 2945.67(A) . . . is not tied to the Double Jeopardy Clause”), one reason for R.C. 2945.67(A)’s bar against the State appealing from “final verdict[s]” is that double jeopardy often bars such appeals. If, as respondents contend, R.C. 2945.67(A)’s “final verdict” limitation does not apply to the four types of decisions as to which the State may appeal “as a matter of right,” then R.C. 2945.67(A) authorizes the State to appeal from “final verdict[s]” underlying such decisions even when double jeopardy bars the appeal.

Thus, Respondents’ interpretation of R.C. 2945.67(A) would mean that R.C. 2945.67(A) somehow authorized the State to appeal from the trial judges’ “final verdict[s]” acquitting the defendants in *Fraternal Order of Eagles, In re D.R.*, and *In re N.I.* even though double jeopardy barred all three appeals. *See* Ohio Constitution, Article I, § 10 (App-70); Amendment V to the U.S. Constitution (App-72). That cannot be correct and would run afoul of R.C. 1.47’s directive that “[i]n enacting a statute, it is presumed that . . . [c]ompliance with the constitutions of the state and of the United States is intended.” R.C. 1.47 (App-64). Further, if the double jeopardy provisions of the Ohio and United States Constitutions alone were to bar improper appeals by the State,

then the “final verdict” limitation on the State’s right to appeal in R.C. 2945.67(A) is superfluous.

Although double jeopardy is not implicated in this case because a jury—albeit one that heard both incomplete and improper evidence eighteen years ago—convicted Mr. Prade,³ basic notions of fairness similar to those that underlie double jeopardy also weigh against Respondents’ interpretation of R.C. 2945.67(A). Interpreting R.C. 2945.67(A) to bar appeals from all “final verdict[s],” not merely those subsumed within “other decision[s],” is consistent with “the ‘deeply ingrained’ principle that ‘the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.’” *Yeager v. United States*, 557 U.S. 110, 117-18, 129 S.Ct. 2360, 174 L.Ed.2d 78 (2009) (citations omitted).

Further, the absence of any reasoned or rational basis to treat “final verdict[s]” within decisions that may be appealed “as a matter of right” differently from those within decisions that may be appealed “by leave” would violate Mr. Prade’s right to Equal Protection under the Fourteenth Amendment. *See generally State v. Bevely*, 142 Ohio St.3d 41, 2015-Ohio-475, 27 N.E.3d 516, ¶¶ 2-19; Ohio Constitution, Article I, § 2 (App-69); Amendment XIV to U.S. Constitution (App-73). And construing the statute in

³ *See Smith v. Massachusetts*, 543 U.S. 462, 467, 125 S.Ct. 1129, 160 L.Ed.2d 914 (2005).

a way that denies an acquitted defendant such as Mr. Prade his freedom is unreasonable and unjust, which contravenes R.C. 1.47(C). (App-64).

4. If The Court Adopts Respondents’ Interpretation of R.C. 2945.67(A), The Exoneration Order’s “Final Verdict” Still Could Not Be Appealed.

If the Court were to accept Respondents’ interpretation of R.C. 2945.67(A), the State still could not appeal from Judge Hunter’s decision “overturn[ing]” Mr. Prade’s conviction. That is because R.C. 2945.67(A) divides—not “orders,” “final orders,” “judgments,” or “final judgments”—but “decision[s]” into those that are appealable “as a matter of right” and “by leave,” and the Exoneration Order included multiple “decision[s].” The State, had it chosen to do so, could have exercised its right to appeal from the decision granting postconviction relief “as a matter of right” under R.C. 2945.67(A) by appealing from Judge Hunter’s evidentiary rulings, legal rulings, or other “decision[s]” that went into the grant of the petition for postconviction relief.

The Exoneration Order plainly contained at least one “other decision” that, under R.C. 2945.67(A), the State could appeal only “by leave” because the State twice filed motions for leave to appeal from the decision in the Exoneration Order granting Mr. Prade a new trial. (Notice of Appeal, *State v. Prade*, 9th Dist. Summit No. 26814 (Feb. 28, 2013) (App-29); Notice of Appeal, *State v. Prade*, 9th Dist. Summit No. 27323 (Apr. 17, 2014) (App-33)).⁴ Consistent with the fact that the Exoneration Order

⁴ The Ninth District dismissed the State’s initial motion for leave to appeal from the new trial decision because, at that time, it was contingent on the exoneration being overturned on appeal. (Journal Entry, *State v. Prade*, 9th Dist. Summit No. 26814 (Mar. 27, 2013) (App-31 to App-32)). When the State sought leave to appeal the

contained multiple “decision[s],” Judge Hunter’s decision finding Mr. Prade actually innocent based on the insufficiency of the evidence that overturned Mr. Prade’s conviction can be viewed, for purposes of R.C. 2945.67(A), as both an “other decision” separate from the grant of the petition for postconviction relief and a “final verdict” from which the State could not appeal.

Judge Hunter’s decisions granting the petition for postconviction relief and overturning Mr. Prade’s conviction plainly are related, but they are distinct. For example, Judge Hunter could have elected to grant the petition for postconviction relief and, rather than finding Mr. Prade actually innocent and overturning the conviction, ordered that there be a new trial.

Splitting single orders or rulings into “decision[s]” that, as appropriate, may or may not be appealed is a regular practice in appeals by the State under R.C. 2945.67(A). “R.C. 2945.67(A) grants discretion to the courts of appeals to allow appeals by the state of a trial court’s ‘substantive law rulings made in a criminal case which result in a

(continued...)

decision granting Mr. Prade a new trial for a second time after the Ninth District reversed the exoneration, the Ninth District dismissed that appeal, this time based on its conclusion that, even though the sole contingency no longer existed, the order granting a new trial was somehow “conditional” and, thus, was not a final order. (Journal Entry, *State v. Prade*, 9th Dist. Summit No. 27323 (Aug. 14, 2014) (App-35 to App-36)). Following Judge Hunter’s retirement, the case was assigned to Judge Croce, who held a second evidentiary hearing in November 2015 and, largely quoting from the Ninth District’s March 14, 2014, decision reversing the Exoneration Order, denied the new trial motion on March 11, 2016. (Agreed Statement of Facts at ¶ 27 (App-62)). Mr. Prade’s appeal from Judge Croce’s March 11, 2016, order currently is pending in the Ninth District. (*Id.* at ¶ 29 (App-62); Notice of Appeal, *State v. Prade*, 9th Dist. Summit No. 28193 (Apr. 7, 2016) (App-55)).

judgment of acquittal so long as the judgment itself is not appealed.” *State v. Edmondson*, 92 Ohio St.3d 393, 396, 750 N.E.2d 587 (2001) (quoting *Bistricky*, 51 Ohio St.3d 157, syllabus). For example, when the State appeals from directed verdicts of acquittal, which are “other decision[s]” under R.C. 2945.67(A) that require leave, courts regularly divide those unitary rulings into (1) the portions of the ruling that the State may appeal and (2) the acquittal itself, which cannot be appealed. *See, e.g., Ross*, 2010-Ohio-6282, at ¶ 51; *Bistricky*, 51 Ohio St.3d at 159; *Arnett*, 22 Ohio St.3d at 188; *Keeton*, 18 Ohio St.3d at 381. Accordingly, even if the Court adopts Respondents’ reading of R.C. 2945.67(A), the statute nonetheless still bars the State’s appeal from Judge Hunter’s decision “overturn[ing]” Mr. Prade’s conviction because *that* portion of her ruling was both an “other decision” and a “final verdict” for purposes of R.C. 2945.67(A).

CONCLUSION

Judge Hunter’s decision in the Exoneration Order finding Mr. Prade actually innocent based on the insufficiency of the evidence was a “final verdict” under R.C. 2945.67(A). Thus, R.C. 2945.67(A) barred the State’s appeal to the Ninth District because “R.C. 2945.67(A) prevents an appeal of *any* final verdict.” *State ex rel. Yates v. Court of Appeals for Montgomery Cty.*, 32 Ohio St.3d 31, 32, 512 N.E.2d 343 (1987) (emphasis in original). Accordingly, the Ninth District patently and unambiguously lacked jurisdiction to review and reverse the decision in the Exoneration Order finding Mr. Prade actually innocent, and all subsequent actions by the Ninth District and Judge Croce, including ordering that Mr. Prade be reincarcerated, were without jurisdiction.

This Court should issue the requested writs of prohibition to the Ninth District and Judge Croce.

Dated: August 25, 2016

Respectfully submitted,

/s/ David Booth Alden

David Booth Alden* (Ohio Bar #6,143)

* Counsel of Record

Lisa B. Gates (Ohio Bar #40,392)

Emmett E. Robinson (Ohio Bar #88,537)

Matthew R. Cushing (Ohio Bar #92,674)

JONES DAY

North Point, 901 Lakeside Avenue

Cleveland, Ohio 44114

Tel.: (216) 586-3939; Fax: (216) 579-0212

dbalden@jonesday.com

lgates@jonesday.com

Mark A. Godsey (Ohio Bar #74,484)

Brian C. Howe (Ohio Bar #86,517)

THE OHIO INNOCENCE PROJECT

P.O. Box 201140

Cincinnati, Ohio 45220-0040

Tel.: (513) 556-6805; Fax: (513) 556-2391

markgodsey@gmail.com

Counsel for Relator Douglas Prade

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of August 2016, a copy of the foregoing Merit Brief of Relator Douglas Prade was served by first class mail via the U.S. Postal Service upon the following:

Michael DeWine
Ohio Attorney General
Tiffany L. Carwile
Sarah Pierce
Assistant Attorneys General
Constitutional Law Section
16th Floor
30 East Broad Street
Columbus, Ohio 43215
Counsel for Respondent
Ninth District Court of Appeals

Sherri Bevan Walsh
Prosecuting Attorney
Colleen Sims
Heaven DiMartino
Assistant Prosecuting Attorneys
6th Floor
53 University Avenue
Akron, Ohio 44308
Counsel for Respondent
Hon. Judge Christine Croce

/s/ David Booth Alden
David Booth Alden (Ohio Bar #6,143)
An Attorney for Relator Douglas Prade

DANIEL M. HARRIGAN

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SUMMIT COUNTY
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

STATE OF OHIO)	CASE NO.: CR 1998-02-0463
)	
Plaintiff,)	JUDGE JUDY HUNTER
)	
v.)	<u>ORDER ON DEFENDANT'S</u>
)	<u>PETITION FOR POST-</u>
DOUGLAS PRADE)	<u>CONVICTION RELIEF</u>
)	<u>OR MOTION FOR NEW</u>
Defendant)	<u>TRIAL</u>
)	

This matter comes before the Court on Defendant Douglas Prade's Petition for Post-conviction Relief, or alternatively, Motion for New Trial. The Court has reviewed the Petition/Motion; amicus curiae, response, reply, and post-hearing briefs; the extensive expert testimony and exhibits at hearing over the course of four days in October of 2012; this Court's September 23, 2010, Order granting the Defendants Application for Post-conviction DNA Testing; and applicable law.

FACTS AND PROCEDURAL HISTORY

On November 26, 1997, Dr. Margo Prade was fatally shot in the front seat of her van parked outside of her medical office in Akron, Ohio. She died from multiple gunshot wounds to her chest. In February of 1998, her ex-husband, Akron Police Captain Douglas Prade, was indicted for aggravated murder, a firearms specification, wiretapping, and possession of criminal tools. Prade raised an alibi defense at trial. On September 24, 1998, then sitting Judge Mary

Spicer sentenced Prade to life in prison after he was found guilty by jury of aggravated murder, among the other counts. Prade is currently incarcerated and has consistently maintained his innocence. On August 23, 2000, Defendant's conviction was affirmed on appeal. *State v. Prade* (2000), 139 Ohio App.3d 676. Later that year, the Ohio Supreme Court declined a discretionary review of his conviction. *State v. Prade* (2000), 90 Ohio St.3d 1490.

In 2004, Defendant filed his first Application for Post-conviction DNA Testing pursuant to a newly enacted Ohio DNA testing statute, R.C. 2953.71. On May 2, 2005, Judge Spicer denied his Motion, in part, finding that DNA testing had been done before trial that had excluded him as the source of the DNA samples taken from the victim. As such, the Court determined that Prade did not qualify for DNA testing because a prior definitive DNA test had previously been conducted. The Ninth District Court of Appeals dismissed his appeal of this denial as untimely. *State v. Prade* (June 15, 2005), 9th Dist. C.A. No. 22718. Defendant did not appeal this denial to the Ohio Supreme Court.

In 2008, Defendant filed his Second Application for Post-conviction DNA Testing based on the Ohio DNA testing statute, as amended in 2006. On June 2, 2008, Judge Spicer again denied his Application, finding that he did not qualify because (1) prior definitive DNA testing had been conducted and (2) he failed to show that additional DNA testing would be outcome determinative. The Ninth District Court of Appeals affirmed this Court's decision. *State v. Prade*, 9th Dist. C.A. No. 24296, 2009 Ohio 704. (*Prade*, 9th Dist.). On May 4, 2010, the Ohio Supreme Court overturned both the trial Court and Court of Appeals, finding that new DNA methods have become available since 1998, and that, as such, the prior DNA test was not "definitive" within the meaning of R.C. 2953.74(A), i.e., new DNA testing methodology could detect information that could not have been detected by the prior DNA test. *State v. Prade*, 126

Ohio St.3d 27, 2010 Ohio 1842, syllabus number one. (*Prade*, S.Ct.) Based on initial DNA testing, the Ohio Supreme Court determined that Prade's exclusion was "meaningless": the 1998 testing methods have limitations because the victim's own DNA overwhelmed the killer's DNA. *Id.*, at ¶ 19. Upon remand, this Court determined that the results of new Y-STR DNA testing would have been outcome determinative at the underlying trial, pursuant to the current DNA testing statute.

Since the remand, the parties initially utilized the services of DNA Diagnostics Lab to test numerous items, including:

1. A piece of metal and swab from Dr. Prade's bracelet (DDC # 01.1 and 01.2),
2. Cutting from Dr. Prade's blouse (DDC # 02),
3. Bite mark swabs (DDC # 05, 22 and 23),
4. Swabs from Dr. Prade's right cheek (DDC # 06, 21, and 24),
5. Microscope slides and vial specimens (DDC # 07.1 – 10.11),
6. Saliva samples from Timothy Holsten (Dr. Prade's fiancé) and Defendant (DDC # 13 and 14),
7. Three buttons from Dr. Prade's lab coat (DDC # 18),
8. Cuttings from the lab coat (DDC # 19 - 20),
9. Fingernail clippings from Dr. Prade (DDC # 25),
10. DNA extracts, blood tubes, and blood cards from Dr. Prade, the Defendant, and Timothy Holsten (DDC # 27 – 33, 37 and 38),
11. DNA extracts from LabCorp (the original DNA Testing facility from the underlying case) (DDC # 34, 35, and 39), and
12. Aluminum foil with DQA cards (DDC # 36).

At the State's request, BCI&I subsequently tested the following additional items:

1. A piece of metal from Dr. Prade's bracelet (BCI Item 102.1);
2. Three buttons from Dr. Prade's lab coat (BCI Items 105.1 – 105.3),
3. 10 fingernail clippings from Dr. Prade (BCI Items 106.1 – 106.10),
4. An additional cutting from the bite mark area from the lab coat (BCI Item 111.1),
5. Swabbing samples taken from the bite mark area (BCI Items 111.2 and 111.3),
6. Samples taken from outside of the bite mark area of the lab coat (BCI Items 114.1 – 114.4).

The DNA testing is now complete. The parties disagree about the meaning/outcome of the test results, particularly results concerning the cuttings from the bite mark area of the lab coat - DDC #19.A.1 and 19.A.2. The Court will address these test results and their meaning below.

PETITION FOR POST-CONVICTION RELIEF

Defendant seeks to have his conviction for aggravated murder vacated and to be released from prison pursuant to his Petition for Post-conviction Relief.¹ Under R.C. 2953.23(A), a petitioner may seek post-conviction relief under only two limited circumstances:

(1) The petitioner was either "unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief," or "the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation," and "[t]he petitioner shows by clear and convincing evidence that, but for the constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted."

¹ Defendant's convictions on six counts of interception of communications and one count of possession of criminal tools are not affected by either the Petition for Post-conviction Relief or Motion for New Trial as these convictions are not in any way related to the DNA evidence. Mr. Prade has now served the sentence imposed on these crimes.

(2) The petitioner was convicted of a felony * * * and upon consideration of all available evidence related to the inmate's case * * *, the results of the DNA testing establish, *by clear and convincing evidence*, actual innocence of that felony offense * * *." (Emphasis added.)

"Actual innocence" under R.C. 2953.21(A)(1)(b) "means that, had the results of the DNA testing * * * been presented at trial, and had those results been analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case * * * *no reasonable factfinder would have found the petitioner guilty of the offense* of which the petitioner was convicted * * *. (Emphasis added.)

Although R.C. 2953.71(L), the outcome-determinative test for granting an application for post-conviction DNA testing, and R.C. 2953.21(A)(1)(b), the actual innocence test for granting a petition for post-conviction relief, do resemble each other, they are not the same. *State v. King*, 8th Dist. No. 97683, 2012 Ohio 4398, P13. R.C. 2953.71(L) requires only a "strong probability" that no reasonable factfinder would have found the defendant guilty, while R.C. 2953.21(A)(1)(b) requires that "no reasonable factfinder would have found the defendant guilty, without exception." *Id.* Furthermore, the trial court's statements in its findings of fact and conclusions of law for a defendant's application for post-conviction DNA testing are not binding on the court's later determination regarding the petition for post-conviction relief. *Id.*

The Court will now address the Defendant's conviction for aggravated murder and the available admissible evidence, including the new Y-STR DNA evidence. The available evidence includes the evidence at the underlying trial. The law of the case applies with respect to subsequent proceedings, including hearings to determine whether the defendant has proven actual innocence based upon the new Y-STR DNA test results.² *King*, at P16-17.

² The law of the case is considered a rule of practice rather than a binding rule of substantive law. *King*, at P16.

DNA EVIDENCE

In the underlying trial, a number of items were tested for DNA, including Dr. Prade's fingernail clippings, fabric from the sleeve of Dr. Prade's lab coat in the area surrounding the bite mark, and a broken bloodstained bracelet. *Prade* (S.Ct.), at P16. Of this evidence, the most significant was the fabric from the lab coat where the bite mark occurred because it contained "the best possible source of DNA evidence as to her [Dr. Prade] killer's identity." *Id.*, at P17 (quoting Dr. Thomas Callaghan, the State's DNA testing expert). Dr. Callaghan tested several cuttings from the cloth from the lab coat, including one from the bite-mark area on the sleeve in the biceps area. *Id.*, at P18. Within the bite-mark area, he analyzed the cutting in three samples – the right side, the left side, and the center of the bite mark. *Id.* Dr. Callaghan testified that, if the biter's tongue came into contact with this area, some skin cells from the biter's lips or tongue may have been left on the fabric of the lab coat. *Id.* Ultimately, the Defendant was excluded as a contributor to the DNA that was typed in this case. *Id.*

Worth noting at the onset of this analysis is that the Defendant's exclusion in the underlying trial as a contributor to the DNA found on the bite mark or anywhere else on Dr. Prade's lab coat is "meaningless":

"[T]he testing excluded defendant only in the sense that DNA *found* was not his, because it was the victim's. But the "exclusion" excluded everyone other than the victim in that the victim's DNA overwhelmed the killer's DNA due to the limitations of the 1998 testing methods." *Prade*, at P20 (Emphasis therein.)

Testing is now complete on the above list of items, using Y-Chromosome Short Tandem Repeat Testing (Y-STR Testing), a testing procedure that was not available in 1998. Significantly, the Defendant has been excluded as the DNA contributor on all the tested items,

including the samples from the bite-mark areas of the lab coat, by use of the Y-STR Testing method.

The Court heard four days of expert testimony relating to the meaning/outcome of the DNA test results and related issues. Defendant's experts were Dr. Julie Heinig, Assistant Laboratory Director for Forensics for DNA Diagnostic Center (DDC), and Dr. Richard Staub, Director for the Forensic Laboratory for Orchid Cellmark (until very recently). The State's experts were Dr. Lewis Maddox and Dr. Elizabeth Benzinger from the Ohio Bureau of Criminal Identification & Investigation (BCI&I). All are well qualified experts in their fields. The primary focus of the tests and testimony from these experts related to the bite-mark cuttings from the lab coat. The Court also has in its possession letters from Jim Slagle, Criminal Justice Section Chief for the Ohio Attorney General, and from Dr. Benzinger, each providing an independent review of the evidence relating the Defendant's request for post-conviction DNA testing.

For this Court's analysis, it is undisputed that (1) Dr. Prade's killer bit her on the left underarm hard enough to leave a permanent impression on her skin through two layers of clothing; (2) her killer is highly likely to have left a substantial quantity of DNA on her lab coat over the bite mark when he bit Dr. Prade; (3) the recent testing identified male DNA on the lab coat bite-mark section; and (4) none of the male DNA found is the Defendant's DNA.

DDC performed the initial Y-STR testing of DNA extracts from a large cutting from the center of the bite-mark section of the lab coat (around where the FBI previously had taken two of the three cuttings from 1998), which became DDC 19.A.1; and from three additional cuttings within the bite-mark section of the lab coat that were then combined with the remaining extract from DDC 19.A.1 to make DDC 19.A.2. It is undisputed that (1) DDC's testing of 19.A.1

identified a single, partial male DNA profile; (2) DDC's testing of 19.A.2 identified a mixture that included partial male profiles of a least two men; and (3) that both 19.A.1 and 19.A.2 conclusively excluded Defendant (and also Timothy Holston) from having contributed the DNA from these two samples. Also undisputed is that these DNA exclusions are not expressed in terms of probabilities; they are certainties – both Defendant and Timothy Holston are excluded as contributors to the partial DNA profiles obtained from the bite-mark area of the lab coat.

A second laboratory at BCI&I performed further Y-STR testing on additional material – one new cutting from the bite-mark section of the lab coat; swabs from the sides of the lab coat; cuttings from the right and left underarm, left sleeve, and back of the lab coat; buttons from the lab coat; fingernails clippings; and a piece of metal from the bracelet - - all at the State's request. It remains undisputed that the Defendant can be excluded as a source of the male DNA from all items tested from BCI&I.

The State argues that the DDC test results relating to the bite-mark section are meaningless due to contamination, transfer touch DNA, or analytical error. In support, the State asserts that the male DNA found on the bite mark section included extremely low levels of trace DNA, i.e. from 19.A.1 (3 - 5 cells) and 19.A.2 (approximately 10 cells), from possibly two up to five male persons, and that how or when that male DNA was deposited is unknown. As such, the State argues that the testing of the DNA bite-mark evidence provided at best inconclusive results that in no way bear on the Defendant's claims for exoneration. Defendant argues the opposite – that the more significant partial male profiles from 19.A.1 and 19.A.2 are more likely than not the DNA from Dr. Prade's killer. Each side provides expert opinion in support of its positions and against the opposing positions.

Upon review, the Court makes the following findings of fact relating to bite-mark evidence from the lab coat:

- (1) Because saliva is a rich source of DNA material, while touch DNA is a weak source of DNA material, it is far more plausible that the male DNA found in the bite-mark section of the lab coat was contributed by the killer rather than by inadvertent contact;
- (2) The Y-STR DNA testing of various areas of the lab coat other than the bite-mark section was expressly designed by the State to test for contamination or for touch DNA and that testing failed to find any male DNA, thereby suggesting a low probability of contamination or touch DNA;
- (3) The ways in which the State suggested that the bite-mark section of the lab coat could have been contaminated with stray male DNA are highly speculative and implausible;
- (4) The small quantity of male DNA found on DDC 19.A.1 and 19.A.2 does not mean that the Y-STR profiles obtained from these samples are invalid or unreliable;
- (5) Earlier testing and treatment of the bite-mark section of the lab coat by the FBI and SERI from 1998 explains the small quantity of male DNA remaining from the crime, and the simple passage of time causes DNA to degrade; and
- (6) The Defendant has been conclusively excluded as the contributor of the male DNA on the bite mark section of the lab coat or anywhere else.

BITE MARK IDENTIFICATION EVIDENCE

As this Court previously found in its September 23, 2010 Order:

Forty-three witnesses testified for the State at trial. Lay witnesses provided detail concerning the relationship between the decedent and the Defendant. Police officers testified concerning the results of their investigation. No weapon or fingerprints were found. Nobody witnessed the killing. *Bite mark*

evidence, however, provided the basis for the guilty verdict on the count for aggravated murder. *State v. Prade*, 2010 Ohio 1842, ¶¶ 3 and 17. (emphasis added).

To obtain conviction on the murder charge at trial, the State focused on convincing the jury that Defendant Prade bit the victim so hard through two layers of clothing that he left an impression of his teeth on her skin. Such evidence was crucial because no other physical, non-circumstantial evidence existed to suggest Prade's guilt. In support of this theory, the State offered testimony from two dentists with training in forensic odontology, Dr. Marshall and Dr. Levine. In refutation, the Defense called Dr. Baum, a maxillofacial prosthodontist. The respective opinions of these three experts covered the spectrum. To sum up, Dr. Marshall believed the bite mark was made by Prade; Dr. Levine testified there was not enough to say one way or another; and Dr. Baum opined that such an act was a virtual impossibility for Prade due to his loose denture.³

Several explanations exist for the disparate opinions. First, the autopsy photographs depict a bite mark impression without clear edge definition. Obviously, the experts' interpretations of the observed patterns of the dental impression depended on the clarity and quality of the bite mark image. Further, the experts' opinions were not only based on differing methodologies but also were without reference to scientific studies to support the validity of the respective opinions. And this is to say nothing of the potential for expert bias. Surely the jury struggled assigning greater weight to the testimony of these witnesses. (Order, pages 10 – 11).

While not nearly as dramatic as with DNA testing procedures, some advancement in protocol for bite-mark identification analysis has occurred since the trial. In fact, the Court has recently heard testimony from two new experts relating to the field of Forensic Odontology – Dr. Mary Bush for the Defendant and Dr. Franklin Wright for the State. Neither Dr. Bush nor Dr. Wright rendered an opinion on whether the Defendant's dental impression was or was not the source of the bite mark on Dr. Prade's lab coat or arm.

Dr. Bush, D.D.S., a tenured professor at the School of Dental Medicine, State University of New York at Buffalo, testified about the original scientific research that she, working with others, has published in peer-reviewed scientific journals concerning two general issues: namely,

³ Marshall trial transcript, page 1406
Levine trial transcript, page 1219
Baum trial transcript, page 1641

(1) the uniqueness of human dentition; and (2) the ability of that dentition, if unique, to transfer a unique pattern to human skin to maintain that uniqueness.

Dr. Wright, D.D.S., a practicing family dentist who is also a forensic odontologist, the past president of and a Diplomate in the American Board of Forensic Odontology (ABFO), and author of several literature reviews and scientific articles addressing dental photography, testified on behalf of the State.

In addition, excerpts from authorities on bite-mark identification analyses were admitted into evidence at these proceedings by stipulation of the parties, specifically excerpts from Paul Giannelli & Edward Imwinkelreid, *Scientific Evidence* (4th ed. 2007) (Giannelli & Imwinkelreid) and from the National Academy of Sciences, *Strengthening Forensic Science In The United States, A Path Forward* (2009).

In 2007, Giannelli & Imwinkelreid stated that “the fundamental scientific basis for bitemark analysis ha[s] never been established.” Similarly, the 2009 National Academy of Sciences (NAS) Report observed: “(1) The uniqueness of the human dentition has not been scientifically established. (2) The ability of the dentition, if unique, to transfer a unique pattern to human skin and the ability of the skin to maintain that uniqueness has not been scientifically established. (i) The ability to analyze and interpret the scope or extent of distortion of bite mark patterns on human skin has not been demonstrated. (ii) The effect of distortion on different comparison techniques is not fully understood and therefore has not been quantified.”

According to the 2009 NAS Report: “Some research is warranted in order to identify the circumstances within which the methods of forensic odontology can provide the probative value.”

As detailed below, Drs. Bush and Wright hold differing opinions regarding the scientific foundation for bite-mark identification evidence. Specifically, Dr. Bush's view is that the scientific basis for bite-mark identification has not been established and, further, that the existing scientific record shows that it likely cannot be, while Dr. Wright's view is that, although it admittedly is subjective and prone to evaluator error, bite-mark identification evidence can be useful adjunctive evidence in limited circumstances (*i.e.*, a closed population of 2 or 3 potential biters where the bite mark has individual characteristics and the potential biters' dentitions are not similar), so long as the conclusions are appropriately qualified.

Dr. Bush testified that her original scientific research relating to bite-mark identification was, in general, exploring areas that the 2009 NAS Report identified as requiring research. She testified concerning the results of eleven studies that she (with others) has conducted concerning the issues identified in the 2009 NAS Report, all of which were published in peer-reviewed scientific journals. None of Dr. Bush's research detailed above was available at the time of Douglas Prade's 1998 trial. Dr. Bush testified that her research shows that human dentition, as reflected in bite marks, is not unique and that human dentition does not reliably transfer unique impressions to human skin through biting. In Dr. Bush's opinion, "these scientific studies raise deep concern over the use of bitemark evidence in legal proceedings."

Conversely, Dr. Wright expressed criticisms of and reservations about Dr. Bush's original scientific research. Dr. Wright testified that, in his view, Dr. Bush's practice of using stone dental models attached to vise grips and applying them to human cadavers, rather than living skin, does not accurately replicate how bite marks leave imprints on human skin during violent crimes. Dr. Wright's view is that it is impossible to meaningfully study bite marks as they occur in violent crimes in a rigorous, controlled, and scientific manner.

While the Court appreciates Dr. Bush's efforts to study the ability of human dentition to transfer unique patterns to human skin, the Court finds the premises and methodology of her studies problematic. Rather, the Court agrees with Dr. Wright's view that it is impossible to study in controlled experiments the issues that the NAS Report says need more research. Nonetheless, both experts' opinions call into serious question the overall scientific basis for bite-mark identification testimony and, thus, the overall scientific basis for the bite-mark identification testimony given by Drs. Marshall and Levine in the 1998 trial.

Although the Court finds Dr. Wright to be an expert in the current field of bite-mark identification, Dr. Wright admitted at the hearing that in his view bite-mark inclusions or exclusions (1) are appropriately based on observation and experience, which necessarily entails subjectivity and a lack of reproducibility under controlled scientific conditions, and (2) are to be used in a very limited set of circumstances – closed populations of biters with significantly different dentitions. Furthermore, Dr. Wright was unable to reconcile the 2009 National Academy of Sciences (NAS) Report finding that unresolved scientific issues remain. These issues require more research before the basis for bite-mark identification can be scientifically established. Lastly, Dr. Wright's testimony raises serious questions about the reliability of the specific bite-mark opinions that Drs. Marshall and Levine offered in the 1998 trial, as they both provided opinions that are not consistent with the ABFO guidelines.⁴

In light of the testimony from Drs. Bush and Wright, the bite-mark evidence in the 1998 trial, as in *State v. Gillispie*, "is now the subject of substantial criticism that would reasonably cause the fact-finder to reach a different conclusion," in that "the new research and studies cast serious doubt to a degree that was not able to be raised by the expert testimony presented at the

⁴ Dr. Levine's opinion on bite mark evidence has been subsequently discredited in the case of *Burke v. Town of Walpole*, 405 F.3d 66 (1st Cir. 2005) where Dr. Levine's identification of a defendant as the biting perpetrator in a criminal case was shown to be erroneous, based upon subsequent DNA testing.

original determination of guilt by the fact-finder.” *State v. Gillispie*, 2d Dist. No. 22877, 2009-Ohio-3640, P150. Bottom line, forensic odontology is a field in flux, and the new evidence goes to the credibility and the weight of the State’s experts’ testimony at the underlying trial.

As previously stated in this Court’s September 23, 2010 Order, “[u]pon hearing from a forensic analyst describing updated and reliable methodology used to determine that Douglas Prade was not a contributor to the biological material from skins cells (lip and tongue) found on the sleeve of Dr. Prade’s lab coat, the jurors would reconsider the credibility of the respective bite mark experts’ testimony.” (Order, page 11). This statement remains true today.

EYEWITNESS EVIDENCE

In this Court’s Order from September 23, 2010, the Court expressed some skepticism concerning the reliability of the testimony from the State’s two key eyewitnesses – Mr. Robin Husk and Mr. Howard Brooks - who both purportedly placed the Defendant near the scene at around the time of the murder.

Mr. Husk, who worked for the car dealership next to the crime scene, testified at trial that he saw the Defendant in Dr. Prade’s office parking lot in the morning of the murder. However, Mr. Husk did not come forward with this information to the police until nine months after the murder and only after months of press coverage that featured the Defendant’s photo. *Prade*, 9th Dist., at P4. Mr. Brooks, a patient of Dr. Prade’s, testified that as he was standing at the edge of the parking lot and heard a car “peeling off.” Brooks testified that the car that exited the parking lot contained a man with a mustache and wearing a Russian-type hat, and a big-chested passenger. Mr. Brooks did not identify the Defendant as the suspected killer until his third police interview. *Id.*

At hearing, Defendant presented the testimony of Dr. Charles Goodsell, an expert in the area of eyewitness memory and identification. Dr. Goodsell testified regarding the three stages of memory – encoding, storage, and retrieval; several factors that can affect memory; and the accuracy of eyewitness identifications.

Based upon his review of the two witnesses' testimony at trial, he determined that a number of factors could have had an adverse impact on the accuracy of Mr. Husk's and Mr. Brooks' identification of the Defendant. Dr. Goodsell testified that Mr. Husk's admittedly brief casual encounter at the dealership prior to the murder, and the significant delay in time between the encounter and his coming forward with the information to the police, all the while seeing the Defendant's image on television and in the newspapers, are factors that may have affected the accuracy and/or altered Mr. Husk's memory of the man he saw.

Dr. Goodsell testified that he found Mr. Brooks' statements to be contradictory - he "didn't pay it [the encounter] no attention," yet was able to provide specific details of the people in the car that was "peeling off." Further, he was not able to identify the Defendant until his third police interview. Both factors could have adversely affected the accuracy of Mr. Brooks' memory of the driver.

Lastly, Dr. Goodsell testified that a person's confidence level can be unduly influenced by comments from the police or repeated exposure to the suspect's image in the media, thereby calling into question the accuracy of this testimony. The State counters that Dr. Goodsell did not consider the possible reasons for Mr. Husk's and Mr. Brooks' delay in coming forward to the police, including not wanting to get involved, and their certainty that the Defendant was the person they saw at Dr. Prade's office on the morning of the murder.

In its September 23, 2010 Order, this Court initially questioned the reliability and accuracy of Mr. Husk's and Mr. Brooks' testimony at trial with respect to seeing the Defendant at the murder scene. Dr. Goodsell's testimony and affidavit with respect to memory and accuracy of witness identifications in general, and his opinion as to factors that could have a negative effect on the accuracy and/or memory of Mr. Husk's and Mr. Brooks' identification of the Defendant, support this Court's initial concerns. Based upon the Y-STR DNA test results, and after reviewing Dr. Goodsell's testimony and affidavit, the Court believes that a reasonable juror would now conclude that these two witnesses were mistaken in their identification of the Defendant.

OTHER CIRCUMSTANTIAL EVIDENCE

The State asserts that other circumstantial evidence from the trial remains admissible and relevant for this Court's determination whether Defendant has met his burden of proving actual innocence. The State points to evidence relating to the Defendant's alleged motive – his financial problems, the impending divorce, his jealousy as evidenced by the taped conversations of Dr. Prade – as well as testimonial statements from Dr. Prade's acquaintances.

To review, Brenda Weeks, a friend of Dr. Prade's, testified concerning her efforts to convince Margo to leave home with her daughters. Annalisa Williams, Dr. Prade's divorce attorney, recounted the Defendant's tone of voice and statements that he made about Margo, namely, calling her a "slut." Al Strong, a former boyfriend of Dr. Prade's, testified that Margo became very upset over a telephone call she received regarding the Defendant's daughters and his current girlfriend, and that Margo resolved to take more extreme action with regard to divorce proceedings. Timothy Holston, Dr. Prade's fiancé, testified that Margo became upset

after receiving a phone call while they were away on a Las Vegas trip and learning that the Defendant had not only entered her house, but stayed with their daughters. Dr. Prade had recently changed the door locks to her house and installed a security system. Lastly, Joyce Foster, Dr. Prade's office manager, testified that Margo was afraid of the Defendant. (State's Post hearing brief, pages 7 – 8, *State v. Prade* (2000), 139 Ohio App.3d. 676, 690 – 694). The Court notes that statements from two other individuals were admitted in error. *Prade*, 139 Ohio App.3d, supra at 694. The Court does not want to minimize the meaning of this evidence and testimony at trial. That said, this Court's experience is that friction, turmoil, and name calling are not uncommon during divorce proceedings.

The Court next considers evidence relating to the Defendant's alibi and the motive for murder. The State argues that Defendant provided a faulty alibi at trial. When the Defendant initially arrived on the scene of the murder at 11:09 a.m., having been paged by his girlfriend and fellow police officer Carla Smith and subsequently informed of the murder, officers on the scene interviewed him. *Prade*, 139 Ohio App.3d, at 698. The Defendant initially told the police officers that he had gone to the gym at his apartment complex to work out at 9:30 a.m. *Id.* At trial, he attempted to show as his alibi that he was working out at the time of the murder between 9:10 a.m. and 9:12 a.m. *Id.*, at 699. One alibi witness at trial confirmed seeing him in the workout room the morning of the murder but was unable to establish the specific time. *Id.* The other alibi witness denied ever seeing the Defendant in the workout room on any date. *Id.* Also, when the Defendant arrived at the scene he was very calm and appeared to have just stepped out of the shower, arguably not the appearance of someone who had left the gym and rushed to the crime scene. *Id.*, at 698. Lastly, both the interviewing officer and Dr. Prade's mother testified that the Defendant had a scratch on his chin the day of the murder. *Id.*

The State also argues that the Defendant's serious financial problems and debts were motives for the murder. A detective testified at trial that a bank deposit slip belonging to the Defendant was found during a search of financial documents allegedly hidden at his girlfriend's home. *Id.*, at 699. The deposit slip was dated October 8, 1997, a month and a half before the murder. *Id.* On the back of the slip was a list of handwritten calculations that tallied the approximate amounts the Defendant allegedly owed creditors in October, the sum of which was subtracted from \$75,000, the amount of life insurance policy proceeds for Dr. Prade. *Id.* The Defendant was still listed as the beneficiary of the policy at that time. *Id.*

The Defendant counters twofold – first, that the amounts listed on the back of the deposit slip do not add up to the amounts owed in October of 1997, but rather, more accurately, add up to amounts owed in the months following the murder; and second, that other evidence casts doubt on the notion that the Defendant had money problems at that time.

Upon review, it is clear that the State presented evidence at trial that finds fault with the Defendant's, and that support's the Defendant's motive for murder – the life insurance policy. To what extent the jury was swayed by this circumstantial evidence this Court does not know. Suffice it to say that Ninth District discussed this evidence on appeal as part of sufficiency of the evidence assignment of error. *Prade*, 139 Ohio App.3d., at 698 - 699.

DEFENDANT'S BURDEN HEREIN

The Court will now address the two requirements that the Defendant must prove in order to obtain post-conviction relief: the petition must be timely, and the Defendant must show by clear and convincing evidence that, upon consideration of all available evidence, including the

results of the recent Y-STR DNA testing, he is actually innocent of the felony offense of aggravated murder.

The Ohio Supreme Court initially remanded this matter to this Court to determine whether new Y-STR DNA testing would have been outcome determinative at the underlying trial, pursuant to his Second Application for Post-conviction DNA Testing. The Defendant's Motion was granted within this Court's September 23, 2010 Order. The Y-STR test results are now back.

R.C. 2953.23(A) governs the timeliness of post-conviction petitions. It provides that a DNA-testing-based petition for post-conviction relief is timely when "the results of the DNA testing establish, by clear and convincing evidence, actual innocence of that felony offense." Based upon this Court's determination below that the new DNA testing establishes by clear and convincing evidence his actual innocence of the felony offense of aggravated murder, the Defendant's Petition for Post-conviction Relief is timely.

This Court had previously determined that the evidence at trial (the bite-mark evidence, the primary basis for the guilty verdict, as opined to by State's trial experts Dr. Marshall and Dr. Levine; and the eyewitness testimony by Mr. Husk and Mr. Brooks) would be compromised should the DNA tests come back excluding the Defendant as the killer of Dr. Prade. This finding remains true today.

The parties presented expert testimony at hearing regarding the field of Forensic Odontology – Dr. Mary Bush for the Defendant and Dr. Franklin Wright for the State. As previously stated, neither Dr. Bush nor Dr. Wright rendered an opinion on whether the Defendant's dental impression was or was not the source of the bite mark on Dr. Prade's lab coat or arm. The Court does not find that Dr. Wright's opinions on the field of forensic odontology in

any way bolster the State's case with respect to the opinions of Dr. Marshall or Dr. Levine in the underlying trial. Dr. Wright admitted at the hearing that in his view bite-mark inclusions or exclusions (1) are appropriately based on observation and experience, which necessarily entails subjectivity and a lack of reproducibility under controlled scientific conditions, and (2) are to be used in a very limited set of circumstances – closed populations of biters (obviously, not the situation in the matter) with significantly different dentitions.

The other circumstantial evidence remains tenuous at best when compared to the Y-STR DNA evidence excluding the Defendant as the contributor of the male DNA on the bite mark section of the lab coat or anywhere else. The accuracy of the two eyewitnesses' testimony at trial remains questionable. The remaining evidence – the testimony by friends and family of Dr. Prade's that she was in fear and/or mistreated by the Defendant, the arguably faulty alibi and the deposit slip - - is entirely circumstantial and insufficient by itself to support inferences necessary to support a conviction for aggravated murder.

Lastly and most important, the Y-STR DNA test results undisputedly exclude the Defendant as the contributor of the male DNA found in the bite-mark section of the lab coat or under Dr. Prade's fingernails. The State's new experts opined that the test results are meaningless due to contamination, transfer touch DNA, or analytical error. This Court is not convinced. The Court concludes that the more probable explanations for the low level of trace male DNA found on the bite-mark section of the lab coat are due to natural deterioration over the years, and to the testing of the saliva DNA from the bite-mark section of the lab coat back in 1998. The saliva from those areas was consumed by the testing procedure, and unfortunately, these areas cannot be retested at this time.

What are we left with now that the Defendant has been conclusively excluded as the male DNA contributor on Dr. Prade's lab coat and elsewhere? We have bite-mark identification testimony from Drs. Marshall and Levine that has been debunked; the eyewitness testimony of Mr. Husk and Mr. Brooks that is highly questionable; the testimony from Dr. Prade's acquaintances that Margo was afraid of the Defendant and that friction existed between the two pending their divorce; the arguably faulty alibi; and the controversy concerning the October 8, 1997, deposit slip as it relates to the Dr. Prade's life insurance policy.

The Court is not unsympathetic to the family members, friends, and community who want to see justice for Dr. Prade. However, the evidence that the Defendant presented in this case is clear and convincing. Based on the review of the conclusive Y-STR DNA test results and the evidence from the 1998 trial, the Court is firmly convinced that no reasonable juror would convict the Defendant for the crime of aggravated murder with a firearm. The Court concludes as a matter of law that the Defendant is actually innocent of aggravated murder. As such, the Court overturns the Defendant's convictions for aggravated murder with a firearms specification, and he shall be discharged from prison forthwith. The Defendant's Petition for Post-conviction relief is granted.

MOTION FOR NEW TRIAL

Alternatively, Defendant seeks a new trial for aggravated murder. Under Rule 33 of the Ohio Rules of Civil Procedure, "[a] new trial may be granted on motion of the defendant ...[w]hen new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at trial." Crim.R. 33(A)(6).

“To warrant the granting of a motion for a new trial in a criminal case, based upon the ground of newly discovered evidence, it must be shown that the new evidence (1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such that could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence.” *State v. Petro* (1947), 148 Ohio St. 505, syllabus.

Evidence is “material” if there is a “reasonable probability” that, had the evidence been disclosed or been available, the result of the trial would have been different. *State v. Roper*, 9th Dist. C.A. No. 22494, 2005 Ohio 4796, P22. “Reasonable probability” of a different trial result is demonstrated by showing that the omission of new evidence would “undermine the confidence in the outcome of the trial.” *Id.*

The State asserts that “probability” means something greater than 50% chance (citing a civil decision from the 10th Appellate District), and as such, the Court must side with the Defendant’s expert testimony over the State’s in order to grant the Motion for New Trial. (Post-hearing Brief, page 2). This Court notes twofold. First, neither Crim.R. 33 itself, nor any criminal case decisions interpreting Crim.R. 33, define “probability” as “over 50%.” Second, the newly discovered evidence is not looked at in a vacuum – the Court must look at the new evidence in conjunction with evidence from the underlying trial in order to determine whether the new evidence would change the outcome of the trial.⁵

⁵ “While the granting of a new trial based on newly discovered evidence obviously involves consideration of newly discovered evidence, the requirement that there be a strong probability of a different result less obviously requires consideration of the evidence adduced at trial. In general, the stronger the evidence of guilt adduced at trial, the stronger the newly discovered evidence would have to be in order to produce a strong probability of a different result. Conversely, the weaker the evidence of guilt at trial, the less compelling the newly discovered evidence would have to be in order to produce a strong probability of a different result. In view of the beyond-a-reasonable-doubt burden of proof, newly discovered evidence need not conclusively establish a defendant’s innocence in order

The State also asserts that Crim.R. 33 is not a substitute for R.C. 2953.21. Crim.R. 33 appears to exist independently from R.C. 2953.21. *State v. Lee*, 10th Dist. No. 05AP-229, 2005 Ohio 6374, P13; *State v. Georgakopoulos*, 9th Dist. C.A. No. 21952, 2004 Ohio 5197; and *Roper*, at P14. R.C. 2953.21 is a collateral civil attack on a criminal judgment as “a means to reach constitutional issues that would otherwise be impossible to reach because the trial court record does not contain evidence supporting those issues.” *Lee*, at P11. Under Crim.R. 33, a motion for new trial exists with or without constitutional claims. *Id.* at P13. Crim.R. 33 merely requires a determination that prejudicial error exists to support the motion - basically newly discovered evidence exists that could not with reasonable diligence have been discovered and produced at trial. *Id.*

The Court will now address the two requirements that the Defendant must prove in order for him to obtain a new trial – the Motion must be timely and the Defendant must show that the new evidence, here the DNA test results, in conjunction with the other evidence from the underlying trial, would show a strong probability or reasonable probability that the result of a new trial would be different, is material, not cumulative, and does not merely impeach or contradict the trial evidence. The State has stipulated to the timeliness of the Motion for New Trial. Needless to say the Y-STR DNA evidence and test results are newly discovered and could not have been ascertained at trial.

With respect to the substantive matter of the Motion, this Court has previously determined, bite-mark evidence aside, that the evidence of guilt at trial lacked strength – it was largely circumstantial and, of course, then-available DNA testing did not link the Defendant to the bite mark on Dr. Prade’s lab coat, her bracelet, or fingernail scrapings. The Y-STR DNA test

to create a strong probability that a jury in a new trial would find reasonable doubt.” *State v. Gillispie*, 2nd Dist. No. 24556, 2012 Ohio 1656, P35.

results are now complete and, significantly, exclude the Defendant as the contributor of the DNA found on those items.

The Court's findings of fact as stated above relating to the Defendant's petition for post-conviction relief are also relevant for the Court's analysis with respect to the Defendant's Motion for New Trial and the analysis is incorporated herein. Upon review, the Court concludes as a matter of law that the Defendant is entitled to a new trial under Crim.R. 33 for aggravated murder and the related firearms specification. The Y-STR DNA test results are material, not cumulative, and do not merely impeach or contradict the circumstantial evidence available in the underlying trial; rather, they exclude the Defendant as the contributor of the newly tested male DNA. Thus, a strong probability exists that had these new Y-STR DNA test results been available in the 1998 trial, that the trial results would have been different – the Defendant would not have been found guilty of aggravated murder.

This Court is cognizant that, should the Defendant's Petition for Post-conviction Relief be upheld on appeal, this Court's ruling on the Defendant's Motion for New Trial will be rendered moot. On the other hand, should this Court's ruling on the Defendant's Petition be overturned, then this Court's analysis and ruling on the Defendant's Motion will be pertinent.

CONCLUSION

At trial, jurors are instructed that they are the sole judges of the facts, the credibility of the witnesses, and the weight to be assigned to the testimony of each witness and the evidence. Introduction of additional expert testimony indicates that new Y-STR DNA test results exclude Douglas Prade as a contributor to DNA collected from the lab coat at the area of the bite mark and other places. This new evidence necessarily requires a re-evaluation of the weight to be

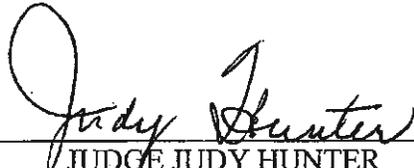
given to the evidence presented at trial. Jurors would be prompted to reconsider, as set forth above, the credibility of the key trial witnesses and the forcefulness of their testimony in the underlying trial, along with the other circumstantial evidence.

The Court finds that no reasonable juror, when carefully considering all available evidence in the underlying trial in light of the new Y-STR DNA exclusion evidence, would be firmly convinced that the Defendant Douglas Prade was guilty of aggravated murder with a firearm. Given such a scenario, the outcome of the deliberation on these offenses would be different – the verdict forms would be completed with a finding of not guilty.

Based primarily upon the test results excluding the Defendant Douglas Prade as the contributor of the Y-STR DNA in the area of the bite mark and elsewhere, the Court finds Defendant's Petition for Post-conviction Relief, and alternatively, his Motion for New Trial, both well taken. Therefore, the Defendant's Petition for Post-conviction Relief for aggravated murder with a firearms specification is approved. In the alternative, should this Court's order granting post-conviction relief be overturned pursuant to appeal, then the Motion for New Trial is granted.

This is a final and appealable under in accordance with R.C. 2953.23(B) and Crim.R. 33. There is no just reason for delay.

SO ORDERED.



JUDGE JUDY HUNTER

I certify this to be a true copy of the original
Sandra Kurt, Clerk of Courts.

Deputy Clerk

COPY.

cc: -

Attorney David Alden

Attorney Mark Godsey

Attorney Michele Berry, amicus curiae

Attorney Michael de Leeuw, amicus curiae

Chief Counsel, Summit County Prosecutor's Office Mary Anne Kovach

Ohio Attorney General Mike Dewine

COPY

ORIGINAL

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DANIEL M. HARRIS

DANIEL M. HARRIS
IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO
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SUMMIT COUNTY
CLERK OF COURTS

STATE OF OHIO

SUMMIT COUNTY
CLERK OF COURTS

CASE NO. CR 98 02 0463

Plaintiff-Appellant

JUDGE ~~SPICER~~ HUNTER 26775

vs.

DOUGLAS E. PRADE

Defendant-Appellee

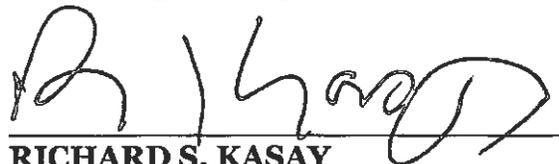
NOTICE OF APPEAL

The State of Ohio gives notice of appeal to the Ninth District Court of Appeals from the Summit County Court of Common Pleas Judgment Entry of January 29, 2013 insofar as it discharges Appellee pursuant to R.C. 2953.21 and R.C. 2953.23.

This appeal is not taken for purposes of delay. This is an appeal of right pursuant to R.C. 2945.67(A).

Respectfully submitted,

SHERRI BEVAN WALSH
Prosecuting Attorney



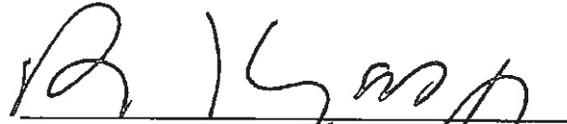
RICHARD S. KASAY
Assistant Prosecuting Attorney
Appellate Division
53 University Avenue, 6th Floor
Akron, Ohio 44308
(330) 643-2800
Reg. No. 0013952

I certify this to be a true copy of the original
Sandra Kurt, Clerk of Courts.

 Deputy Clerk

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal was forwarded by regular U.S. First Class mail to David B. Alden and Lisa B. Gates, Jones Day, North Point, 901 Lakeside Avenue, Cleveland, Ohio 44114; and to Mark Godsey and Carrie E. Wood, Ohio Innocence Project, University of Cincinnati College of Law, P. O. Box 210040, Cincinnati, Ohio 45221-0040 on this 29th day of January, 2013.



RICHARD S. KASAY
Assistant Prosecuting Attorney
Appellate Division

COURT OF APPEALS
DANIEL M. HARRIGAN

DANIEL M. HARRIGAN
IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY OHIO

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SUMMIT COUNTY
CLERK OF COURTS

SUMMIT COUNTY
CLERK OF COURTS

STATE OF OHIO

CASE NO.

CR 98 02 0463

Plaintiff-Appellant

ORIGINAL

JUDGE HUNTER

vs.

DOUGLAS E. PRADE

26814

Defendant-Appellee

NOTICE OF APPEAL

The State of Ohio gives notice of appeal to the Ninth District Court of Appeals from the Summit County Court of Common Pleas Judgment Entry of January 29, 2013 insofar as it grants Appellee a new trial.

This appeal is not taken for purposes of delay. This is an appeal by leave of court pursuant to R.C. 2967.45(A).

Respectfully submitted,

SHERRI BEVAN WALSH
Prosecuting Attorney



RICHARD S. KASAY
Assistant Prosecuting Attorney
Appellate Division
53 University Avenue, 6th Floor
Akron, Ohio 44308

(330) 643-2800
Reg. No. 0013952

PROOF OF SERVICE

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A handwritten signature in black ink, appearing to read 'R. S. Kasay', is written over a horizontal line.

RICHARD S. KASAY
Assistant Prosecuting Attorney
Appellate Division

COURT OF APPEALS
DANIEL M. HOLTMAN

STATE OF OHIO)

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IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

COUNTY OF SUMMIT)

SUMMIT COUNTY
CLERK OF COURTS

STATE OF OHIO

C.A. No. 26814

Appellant

v.

DOUGLAS PRADE

Appellee

JOURNAL ENTRY

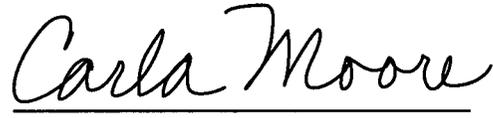
On January 29, 2013, the trial court granted Douglas Prade's application for post-conviction relief. That order also conditionally granted Mr. Prade's motion for new trial, ordering that "should the Court order granting post-conviction relief be overturned pursuant to appeal, then the Motion for New Trial is granted." The State of Ohio appealed the granting of post-conviction relief and has now moved for leave to appeal the conditional granting of the motion for new trial. The State has also asked that the appeals be consolidated. Mr. Prade has not responded in opposition.

R.C. 2945.67 permits the state to appeal trial court orders in a criminal case by leave of court. Upon review of the State's motion, however, we decline to grant leave to appeal the order concerning the motion for new trial because it is conditional. Specifically, the order purports to grant the motion on the condition that a future event occurs. As such, it does not constitute a final, appealable order because it is not sufficiently specific to constitute a judgment. See 46 Am. Jur. 2d Judgments § 168 ("If a judgment looks to the future in an attempt to judge the unknown, it is wholly void because

it leaves to speculation and conjecture what its final effect may be.”) *See also Goering v.*

Schille, 1st Dist. No. C-110525, 2012-Ohio-3330 (holding that a contingent order did not “prevent a judgment” and was not final).

The motion for leave to appeal is denied. The appeal is dismissed. Costs are taxed to the appellant.



Judge

Concur:

Belfance, J.

Whitmore, J.

DEBIL M. HERRIGAN

2014 APR 17 AM 10:47

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY OHIO

27323

SUMMIT COUNTY
CLERK OF COURTS
STATE OF OHIO

CASE NO. CR 98 02 0463

Plaintiff-Appellant

**JUDGE HUNTER
JUDGE CROCE**

vs.

DOUGLAS E. PRADE

Defendant-Appellee

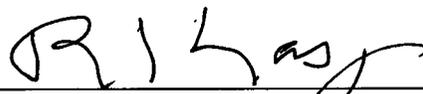
NOTICE OF APPEAL

The State of Ohio gives notice of appeal to the Ninth District Court of Appeals from the Summit County Court of Common Pleas Judgment Entry dated January 29, 2013 insofar as it grants Appellee a new trial.

This appeal is not taken for purposes of delay. This is an appeal by leave of court pursuant to R.C. 2967.45(A).

Respectfully submitted,

SHERRI BEVAN WALSH
Prosecuting Attorney

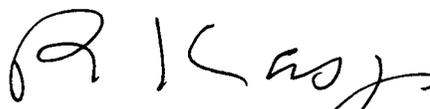


RICHARD S. KASAY
Assistant Prosecuting Attorney
Appellate Division
53 University Avenue, 6th Floor
Akron, Ohio 44308

(330) 643-2800
Reg. No. 0013952

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal was forwarded by regular U.S. First Class mail to David B. Alden and Lisa B. Gates, Jones Day, North Point, 901 Lakeside Avenue, Cleveland, Ohio 44114; and to Mark Godsey, Ohio Innocence Project, University of Cincinnati College of Law, P. O. Box 210040, Cincinnati, Ohio 45221-0040 on this 17th day of April 2014.



RICHARD S. KASAY
Assistant Prosecuting Attorney
Appellate Division

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

COURT OF APPEALS
DANIEL M. MORTIGAN

STATE OF OHIO

2014 AUG 14 AM 11:21

C.A. No. 27323

Appellant

SUMMIT COUNTY
CLERK OF COURTS

v.

DOUGLAS PRADE

Appellee

JOURNAL ENTRY

The State of Ohio has moved this Court for leave to appeal the trial court's January 29, 2013, order which conditionally granted Douglas Prade's motion for new trial. Mr. Prade has responded in opposition. This is the State's second attempted appeal of this order. This Court previously determined in C.A. No. 26814 that the order is conditional and, therefore, not final and appealable. This Court's determination is the law of the case with respect to this proceeding.

In its order, the trial court considered Mr. Prade's petition for postconviction relief and alternatively, his motion for new trial. The trial court granted the petition for postconviction relief. In the decisional portion of the order, it also decided to grant his motion for new trial. However, at the conclusion of the entry where the trial court set forth the actual order of the court, it unequivocally granted the petition for postconviction relief and granted the motion for a new trial on a conditional basis as follows:

Therefore, the Defendant's Petition for Post-conviction Relief for aggravated murder with a firearms specification is approved. In the alternative, should this Court's order granting post-conviction relief be overturned pursuant to appeal, then the Motion for New Trial is granted.

Given the above, the trial court essentially granted the motion for new trial in its decision but then did not enter a final order consistent with its decision. Instead, it conditioned its order upon the occurrence of a future event, namely, this Court's reversal of the trial

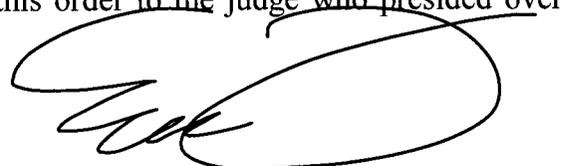
court's granting of postconviction relief. Thus, the trial court did not actually enter a final order with respect to the motion for new trial.

It appears that the trial court may have taken this step because it recognized in its analysis of the new trial motion that its order granting the new trial could become moot if, on appeal, this Court affirmed its grant of the petition for postconviction relief. However, the trial court could have unconditionally granted the motion for new trial and, on appeal, assuming that the grant of postconviction relief was affirmed, that portion of the appeal contesting the propriety of granting the motion for a new trial would have been rendered moot.

As this Court previously determined, the trial court's conditional order is not sufficient to constitute a final judgment or order that the State may appeal pursuant to R.C. 2945.67. *See Goering v. Schille*, 1st Dist. No. C-110525, 2012-Ohio-3330. Thus, in order to make its decision to grant the motion for new trial a final order, the trial court must simply reenter its order granting the motion for new trial on an unconditional basis.

Accordingly, the motion for leave to appeal is denied. The appeal is dismissed. Costs are taxed to appellant.

The clerk of courts is ordered to mail a notice of entry of this judgment to the parties and make a notation of the mailing in the docket, pursuant to App.R. 30, and to provide a certified copy of the order to the clerk of the trial court. The clerk of the trial court is ordered to provide a copy of this order to the judge who presided over the trial court action.



Judge

Concur:
Whitmore, J.
Moore, J.

The State separately appealed the Order granting the Petition for Post Conviction Relief (C.A. No. 26775) and the Motion for New Trial (C.A. No. 26814 and C.A. No. 27323). With respect to the Petition for Post Conviction Relief, the Ninth District Court of Appeals reversed the trial court - concluding that, based upon the enormity of evidence in support of the Defendant's guilt, and the fact that the meaningfulness of DNA exclusion was far from clear, the Defendant did not meet his burden of establishing by clear and convincing evidence his actual innocence. *State v. Prade*, 9th Dist. No. 26775, 2014-Ohio-1035, ¶145. With respect to the Motion for New Trial, the Ninth District Court ultimately found that the trial court's order granting the Motion for New Trial was not a final and appealable order, but rather, a conditional order. As such, the Ninth District Court determined that the Order on the Motion for New Trial needed to be issued on an unconditional basis. *Id.* The Ohio Supreme Court declined to hear the appeals on either the Petition for Post Conviction Relief or the Motion for New Trial. (Case No. 2014-0432 and Case No. 2014-1992).

At an oral hearing on June 12, 2015, the Defendant argued that this Court should grant a new trial based on newly discovered DNA evidence; newly discovered evidence in the area of forensic odontology, as well as eyewitness identification; and be permitted to submit testimony and argument as to each of those issues during any subsequent hearings. After hearing oral arguments, this Court ruled that in deciding the issue of a new trial, it would only take testimony as it related to newly discovered DNA evidence. Further, this Court held it would accept written briefs as to whether it should grant a new trial on newly discovered evidence in the area of forensic odontology and any other arguments for a new trial based solely on newly discovered evidence.

The parties have fully briefed the issues, as well as provided testimonial evidence at a hearing regarding the DNA Y - Chromosome Short Tandem Repeat (Y-STR) testing. This matter is now ripe for ruling.

MOTION FOR NEW TRIAL STANDARD – THE PETRO TEST

Crim.R. 33(A)(6) provides that a new trial may be granted “when new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at trial.”

To warrant the granting of a motion for a new trial in a criminal case, based upon the ground of newly discovered evidence, it must be shown that the new evidence (1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such that could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence.

State v. Petro (1947), 148 Ohio St. 505, syllabus.

And finally, in order to properly address a motion for new trial, the trial court must look at the new evidence in the context of all the former evidence at trial. *State v. Gillispie*, 2nd Dist. No. 24456, 2012-Ohio-1656, ¶35.

In general, the stronger the evidence of guilt adduced at trial, the stronger the newly discovered evidence would have to be in order to produce a strong probability of a different result. Conversely, the weaker the evidence of guilt at trial, the less compelling the newly discovered evidence would have to be in order to produce a strong probability of a different result. In view of the beyond-a-reasonable-doubt burden of proof, newly discovered evidence need not conclusively establish a defendant's innocence in order to create a strong probability that a jury in a new trial would find reasonable doubt.

Id.

STRONG PROBABILITY

“A new trial is an extraordinary measure and should be granted only when the evidence presented weighs heavily in favor of the moving party.” *State v. Gilcreast*, 9th Dist. No. 04CA0066, 2005-Ohio-2151, ¶55. “To warrant the granting of a new trial, the new evidence must, at the very least, disclose a strong probability that it will change the result if a new trial is granted.” *State v. Cleveland*, 9th Dist. No. 08CA009406, 2009-Ohio-397, ¶49.¹ In other words, there must be a strong probability that the new evidence would change the verdict. *State v. Brown*, 9th Dist. No. 26309, 2012-Ohio-5049, ¶4; and *State v. Jalowiec*, 9th Dist. No. 14CA010548, 2015-Ohio-5042, ¶30. A defendant bears the burden of demonstrating this strong probability. *Cleveland*, at ¶49. See also *State v. Gilliam*, 9th Dist. No. 14CA010558, 2014-Ohio-5476, ¶12.

NEW EVIDENCE DISCOVERED SINCE TRIAL/ DUE DILIGENCE

“New evidence is that which has been discovered since trial was held and could not in the exercise of due diligence have been discovered before that.” *State v. Lather*, 6th Dist. No. OT-03-041, 2004-Ohio-6312, ¶11, citing *Petro*.

MATERIALITY

Evidence is “material to the issues” when there is a “reasonable probability,” that had the evidence been disclosed or available at trial, the result of the trial would have been different. *State v. Roper*, 9th Dist. No. 22494, 2005-Ohio-4796, ¶22. “Reasonable probability” of a different trial result is demonstrated by showing that the omission of new evidence would “undermine the confidence in the outcome of the trial.” *Id.*

CUMULATIVE

¹ There appears to be no Ohio case law that specifically defines “strong probability.”

While there appears to be no Ohio case law that specifically defines “not merely cumulative to former evidence”, “cumulative – in law” has been defined as “designating additional evidence that gives support to earlier evidence. *Webster’s New World Dictionary of the American Language* (College Ed. 1966).

“Science is an ever-evolving field, and criminal defendants should not be afforded a new trial every time the scientific testing methods for forensic evidence change.” *State v. Johnson*, 8th Dist. No. 93635, 2014-Ohio-4117, ¶26.

IMPEACHMENT

With respect to impeachment, “newly discovered evidence that merely impeaches or contradicts the former evidence ‘very well could have resulted in a different verdict,’ but that is not enough to satisfy the test for granting a new trial.” *Brown*, at ¶4, quoting *State v. Pannell*, 9th Dist. No. 96CA0009, 1996 Ohio App. LEXIS 3967, 1996 WL 515540, *3 (Sept. 11, 1996). Rather, the character of that evidence is relevant as to whether a different result is a strong probability. *Jalowiec*, at ¶38.

ANALYSIS

EYEWITNESS IDENTIFICATION EVIDENCE

Dr. Goodsell, the Defendant’s expert in the area of eyewitness memory and identification, testified at the October 2012 hearing regarding the three stages of memory (encoding, storage, and retrieval), as well as several factors that can affect memory and the accuracy of eyewitness identification.

The validity of eyewitness memory and identification has been questioned for years both by Defense attorneys and experts alike. The accuracy of eyewitnesses in describing the height,

weight, eye color and physical description of a suspect/defendant, as well as cross-racial identification, have been the subject of vigorous cross examinations and many appeals.

In analyzing everything before the Court, this Court finds that the expert eyewitness identification testimony does not disclose a strong probability that a different verdict would be reached if a new trial is granted. While Dr. Goodsell's testimony and opinions did not exist in 1998, and his opinions could not have been discovered in the exercise of due diligence before trial, there is no reasonable probability that had Dr. Goodsell's 2012 opinions been disclosed or available in 1998 the result of the trial would have been different.

During the 1998 trial, counsel for the Defendant cross-examined the two eyewitnesses on the majority of the weaknesses raised by Dr. Goodsell. *Prade*, 2014-Ohio-1035, ¶128. The Ninth District Court held, "the jury, therefore, was well aware of the possible problems with the identifications of the respective eyewitnesses and chose, nonetheless, to believe them." *Id.* The Defendant's theory at trial was that the eyewitnesses' testimony was unreliable based on the timing of when they came forward, the ability to see Margo Prade's killer, as well as the accuracy of their description of the suspect. Dr. Goodsell's opinions are merely cumulative of the answers the Defendant's trial attorney elicited during cross examination of the two eyewitnesses during the 1998 trial and further, only tend impeach and/or contradict the testimony of the two eyewitnesses. Simply stated, Dr. Goodsell's testimony is similar to evidence that was presented in 1998 by a different expert and therefore this Court finds Dr. Goodsell's expert opinions are not newly discovered evidence and clearly fails the *Petro* test.

BITE MARK EVIDENCE

This Court previously limited the hearing on the Motion for New Trial to the newly discovered DNA evidence and Y-STR testing procedures but provided the parties the opportunity to address the bite mark evidence by written briefs subsequent to the November 4, 2015 hearing.

As background, the 1998 jury trial included expert testimony from Dr. Lowell Levine and Dr. Thomas Marshall (experts in forensic odontology/dentistry for the State) and Dr. Peter Baum (a maxillofacial prosthodontist for the Defendant). *Prade*, 2014-Ohio-1035, ¶63-70. The Ninth District Court of Appeals held:

As for the dental experts, the jury was essentially presented with the entire spectrum of opinions on the bite mark at trial. That is, one expert testified that Prade was the biter, one testified that the bite mark was consistent with Prade's dentition, but that there was not enough there to make any conclusive determination, and the third testified that Prade lacked the ability to bite anything. Moreover, the expert who definitively said Prade was the biter, Dr. Marshall, also said that the expert who determined a definitive inclusion could not be made (Dr. Levine) was "one of the leading bite mark experts in the country." The jury also heard testimony during cross-examination that dental experts often disagree and that bite mark testimony has led to wrongful convictions.

Prade, 2014-Ohio-1035, ¶129.

In support of his Motion for New Trial and a request for hearing, the Defendant argues that the developments in bite mark science that have occurred since 1998 completely discredit the State's reliance on the bite mark evidence at trial to link the Defendant to the crime. Defendant asserts that multiple highly credible authorities have since concluded that "the fundamental scientific basis for bite mark analysis [has never been established]" – citing:

- 1 Paul Giannelli & Edward Inwinkelreid, *Science Evidence* §13.04 (4th ed. 2007);
- National Academy of Sciences' 2009 Report titled "Strengthening Forensic Science in the United States: A Path Forward";

- 11 separate studies from 2009 to 2012 authored by Dr. Mary Bush and her testimony at the October 2012 hearing;
- Letter posted on the American Board of Forensic Odontology's website; and Dr. Wright's testimony at the October 2012 hearing;
- Professor Iain Pretty's 2015 Construct Validation Study; and
- Video recording of the February 12, 2016 meeting of the Texas Forensic Science Commission.

In October 2012, Dr. Mary Bush, an expert in forensic odontology research, testified for the Defendant, and Dr. Franklin Wright, Jr., also an expert in forensic odontology, testified on behalf of the State. Both experts were completely at odds with each other as to the reliability of bite mark evidence at trial. The Defendant maintains that Dr. Bush's expert testimony on bite mark identification is far more credible and better grounded in science than that of Dr. Wright, especially when Dr. Wright conceded at the October 2012 hearing that the numerous questions raised in the National Academy of Sciences' (NAS) 2009 Report regarding the basis for bite mark identification have not been answered in the affirmative.

Dr. Bush testified that, based upon her studies on cadavers, skin has not been "scientifically established as an accurate recording medium of the biting dentition." On the other hand, Dr. Wright testified that, based upon his review of hundreds of actual bite marks throughout his career, that human dentition is unique and capable of transferring to human skin. Both experts also admitted to certain shortcomings in their own research. Dr. Bush admitted: 1) that cadavers differ from real people in certain respects related to her testing, and 2) that she did not have a statistician determine a rate of error for the placement of the dots on the bite mark molds. Dr. Wright admitted: 1) that although bite mark evidence is generally accepted within the

scientific community, that an opinion regarding the evidence is only as good as the bite mark evidence available and the subjective interpretation of the analyst examining the evidence, and 2) that there have been instances where bite mark testimony has helped to convict individuals who were later exonerated based upon other evidence such as DNA. See also generally, *Prade*, 2014-Ohio-1035, ¶¶92-101.

In analyzing everything before the Court, this Court finds that the bite mark evidence does not disclose a strong probability that a different verdict would be reached if a new trial is granted, and that while the opinions of Dr. Bush and Dr. Wright did not exist in 1998 and could not have been discovered before trial, the only thing newly discovered is the Defendant's awareness of these particular experts. The new bite mark opinions are not material to the issues since there is no reasonable probability that had these differing opinions from 2012 been disclosed or available in 1998, the result of the trial would have been different. The expert opinions of Dr. Bush and Dr. Wright, while differing between each other, address many of the various differences that were testified to by Dr. Levine, Dr. Marshall and Dr. Baum during the 1998 trial. In light of those differing opinions, the 1998 jury still found the Defendant guilty.

The reliability of bite mark evidence has been a matter of contention for decades – long before the 1998 trial. Even though new possible guidelines, published articles, and other studies critical of the use of bite mark evidence have arisen since the Defendant's trial in 1998, those same basic criticisms existed at the time of trial. The Defendant's theory at trial was that the bite mark identification was unreliable. This Court finds Dr. Bush's opinion post-trial, the other published articles and studies, as well as the affidavit of Dr. Iain Alastair Pretty along with the proposed changes to the American Board of Forensic Odontology (AFBO) are nothing more than cumulative evidence to what was previously presented on the subject at trial through the

testimony of Dr. Levine, Dr. Marshall and Dr. Baum - different experts with the same opinions. See, e.g. *State v. Graff*, 8th Dist. No. 102073, 2015-Ohio-1650, ¶12; and *Johnson*, at ¶25 (“this is not a case where advancements in scientific research allow evidence to be disproved”).

In conclusion, while there has been a sea of changing opinions in the science of bite mark identification, the evidence submitted by the Defendant is merely additional criticisms and/or impeachment of the testimony presented at trial in 1998. The bite mark evidence clearly fails the *Petro* test, and therefore is not newly discovered evidence.

Y-STR DNA EVIDENCE – POST TRIAL

The Defendant argues that Y-STR DNA testing completed in 2012 is newly discovered evidence and that the existence of male DNA at or near the bite mark of the lab coat conclusively excludes the Defendant as the contributor, and as such, he should be granted a new trial. The Defendant asserts that one of the more significant partial male profiles from 19.A.1 and 19.A.2 must be that of Margo Prade’s killer and that no other male DNA was found on other parts of the lab coat.

While the State concedes that Y-STR DNA testing was not available at the time of trial, it maintains that the Defendant was excluded as a possible DNA contributor in the 1998 trial, and that the new Y-STR test results did not bring about a different result. Alternatively, the State argues that even if the Court determines that Y-STR DNA testing and results are newly discovered evidence, the DDC test results relating to the bite-mark section of the lab coat are meaningless due to contamination, transfer or touch DNA, and/or analytical error. In support, the State asserts that the male DNA found on the bite mark section included extremely low levels of trace DNA, i.e. from 19.A.1 (3 – 5 cells) and 19.A.2 (approximately 10 cells), from possibly two up to five male persons, and that how or when that male DNA was deposited is unknown.

The State argues that no expert who testified at the October 2012 and November 2015 hearings could opine with any certainty as to when these new DNA profiles were deposited on the swatch of the lab coat, rather, each side merely provided expert opinions in support of their respective positions and against the opposing experts' positions.² Thus, the State argues, at best, the DNA bite-mark evidence testing results provide inconclusive results, not new evidence to support the Defendant's request for a new trial.

DNA Diagnostic Center (DDC) performed the initial Y-STR DNA testing from extracts of a large cutting from the center of the bite-mark section of the lab coat (around where the FBI previously had taken two of the three cuttings from 1998), which became DDC 19.A.1; and from three additional cuttings within the bite-mark section of the lab coat that were then combined with the remaining extract from DDC 19.A.1 to make DDC 19.A.2. It is undisputed that (1) DDC's testing of 19.A.1 identified a single, partial male DNA profile; (2) DDC's testing of 19.A.2 identified a mixture that included partial male profiles of a least two men; and (3) that both 19.A.1 and 19.A.2 conclusively excluded the Defendant (and also Timothy Holston – Margo's then current boyfriend) from having contributed male DNA in these two samples. Also, it is undisputed that these DNA exclusions of both the Defendant and Timothy Holston as contributors to the partial DNA profiles obtained from the bite-mark area of the lab coat were not expressed in terms of probabilities; but rather in certainties.

A second laboratory, Ohio Bureau of Criminal Identification & Investigation (BCI&I), performed further Y-STR testing on additional material – one new cutting from the bite-mark section of the lab coat; swabs from the sides of the lab coat; cuttings from the right and left underarm, left sleeve, and back of the lab coat; buttons from the lab coat; fingernail clippings;

² Dr. Julie Heinig, the Assistant Laboratory Director for Forensics for DNA Diagnostic Center (DDC) and Dr. Richard Staub, prior Director for the Forensic Laboratory for Orchid Cellmark, testified for the Defendant; and both Dr. Lewis Maddox and Dr. Elizabeth Benzinger from the BCI&I testified for the State,

and a piece of metal from Margo Prade's bracelet – all at the State's request. From all the items tested by BCI&I the Defendant was also excluded as a source of the male DNA.

This Court has performed an independent review of the Y-STR DNA testing and results, the testimony of Dr. Staub, Dr. Heinig, Dr. Benzinger, and Dr. Maddox and all admitted exhibits from October 2012 hearing before Judge Hunter, as well as the testimony from the same four experts and all newly admitted exhibits from this Court's two-day hearing in November 2015.³

First, this Court finds that Y-STR DNA testing was not in existence at the time of the 1998 trial, and therefore, the Defendant could not in the exercise of due diligence have discovered it before trial. *State v. Prade*, 126 Ohio St.3d 27, 2010-Ohio-1842, ¶¶ 22 and 29; and *Prade*, 2014-Ohio-1035, ¶7-8.

Second, this Court finds that the Y-STR DNA test results conclusively exclude the Defendant as a contributor of the DNA on the "bite mark" - the same exclusion as in the 1998 criminal trial. During the 1998 trial and post trial hearings no expert ever testified or indicated that the Defendant's DNA was ever found anywhere on the lab coat including at or near the bite mark.

Third, with respect to the meaning of the Y-STR DNA results as it relates to whether the two other partial males DNA profiles are that of Margo Prade's killer, this Court finds that the test results remain inconclusive. None of the four experts could opine with any degree of certainty as to when these two partial male profiles were deposited on the fabric swatch. This well worn lab coat and swatches traveled at various times to at least five different laboratories and were handled by an undetermined number of individuals. This Court therefore concludes that more likely than

³ As this Court had the benefit of reviewing the prior transcripts and exhibits from the 2012 hearing in advance of the November 2015 hearing, it was well cognizant of the complexity of the issues at hand.

not the existence of the two partial male DNA profiles occurred due to incidental transfer and/or contamination rather than containing the true DNA from Margo Prade's killer.

Although the Ninth District Court of Appeals addressed the Y-STR testing results along with the testimony from the Defendant and State's experts under the "clear and convincing/actual innocence" standard found in R.C. 2953.21(A)(1)(b) and the other "available admissible evidence" standard found in R.C. 2953.21(A)(1)(b) and R.C. 2953.23(A)(2), their observations, as well as their methodology and analysis of the evidence with respect to the Y-STR testing results, remain instructive and pertinent herein.

In the Ninth District Court's analysis and conclusion section of that decision, it determined that "while the results of the post-1998 DNA testing appear at first glance to prove Prade's innocence, the results, when viewed critically and taken to their logical end, only serve to generate more questions than answers." *Prade*, 2014-Ohio-1035, ¶112. The Court went on to state:

Without a doubt, Prade was excluded as a contributor of the DNA that was found in the bite mark section of Margo's lab coat. The DNA testing, however, produced exceedingly odd results. Of the testing performed on the bite mark section, one sample (19.A.1) produced a single partial male profile, another sample (19.A.2) produced at least two partial male profiles, and a third sample (111.1) failed to produce any male profile. All of the foregoing samples were taken from within the bite mark, some directly next to each other, but each sample produced completely different results. Meanwhile, the testing performed on four other areas of the lab coat also failed to produce any male profiles.

There was a great deal of testimony at the PCR hearing that epithelial cells from the mouth are generally plentiful. Indeed, Dr. Maddox testified that buccal swabs from the mouth are the preferred method for obtaining DNA standards from people due to the high content of cells in the mouth and that, because a buccal swab typically contains millions of cells, it is usually necessary for BCI to either take a smaller cutting or to dilute a sample so that its testing equipment can handle the amount of DNA that is being inputted for testing. Dr. Benzinger testified that the ideal amount of cells for DNA testing is about 150 cells and that the threshold amount for testing is about four cells. There is no dispute that the testing that occurred here was at or near the threshold amount. Specifically, Dr.

Benzinger testified that 19.A.1 only contained about three to five cells and 19.A.2 only contained about ten cells. Thus, despite the fact that there are usually millions of cells present when the source of DNA is a person's mouth, the largest amount of DNA located here was ten cells. Moreover, those ten cells were not from the same contributor.

When DDC tested 19.A.2, it discovered at least two partial male profiles. More importantly, the major profile that had emerged when DDC tested 19.A.1, was different than the major profile that emerged when DDC tested 19.A.2. While the results from 19.A.1 showed a 15 allele at the DYS437 locus, the results from 19.A.2 showed a 14 allele at the DYS437 locus, with the 15 shifting to a minor allele position that fell below DDC's reporting threshold. Thus, in addition to the fact that two different partial profiles emerged in DDC's tests, the major profile that emerged was not consistent. It cannot be said, therefore, that even though multiple profiles were uncovered, there was one consistent, stronger profile that emerged as the profile of the biter.

The inconsistency in the major profile in DDC's tests calls into question several of the conclusions that Prade's DNA experts made. For instance, Dr. Heinig stated:

[B]ased on everything that I've testified [to], I believe that the major DNA that we obtained from [19.A.2] is very likely from the saliva, and that if there is contamination the minor alleles, for instance, could be from contact from another individual or more than one individual * * *.

Because the minor allele in 19.A.2 was the major allele in 19.A.1, however, it is difficult to understand how Dr. Heinig could distinguish between the two and rely on one as "the major DNA" while attributing the other to contamination. Similarly, Dr. Staub testified that he felt "that the biting activity should leave a lot more cellular material than touch would; and, therefore, if they're getting any result, now certainly some of that should be from the biting event." Yet, DDC did not find "a lot more cellular material" from one profile. Instead, it uncovered *inconsistent major profiles within an extremely low amount of DNA cells*.

Another significant reality about the bite mark section of Margo's lab coat is that amylase testing resulted in a negative test result. Even back in 1998, therefore, it was determined that *no amylase (saliva) was present on the bite mark section*. That fact rebuts any assertion that there was a "slobbering killer." It also undercuts the assumption made by both the defense witnesses and the trial court that there had to be DNA from the biter on the lab coat due to the large amount of DNA in saliva. Quite simply, there was never a shred of evidence in this case that the killer actually deposited saliva on the lab coat. Even back in 1998, Dr. Callaghan testified that "if someone bites someone else or that fabric, they *may*

have left DNA there. It can be of such a low level that it's not detected. Or they may have left no DNA there." (Emphasis added.) The only enzyme test conducted to determine whether saliva was present, the amylase test, was negative. And while the preliminary test showed probable amylase activity, Dr. Benzinger specified: "[i]f the confirmatory test is negative, then your results are negative."

Although the trial court rejected the State's contamination theories as "highly speculative and implausible," the results of the DNA testing speak for themselves. The fact of the matter is that, while it is indisputable that there was only one killer, at least two partial male profiles were uncovered within the bite mark. Even Dr. Heinig admitted that, for that to have occurred, there had to have been either contamination or transfer. And, while the lab coat itself was not contaminated, as evidenced by the negative results obtained on the four other locations cut from the coat, the inescapable fact, once again, is that the bite mark section itself produced more than one partial male profile. Whatever the explanation for how more than one profile came to be there, the fact of the matter is that the profiles are there.

Both the defense experts and the trial court concluded that the only logical explanation for the low amount of DNA found in the bite mark section was that a substantial amount of the biter's DNA was lost due to the various testing that occurred over the years and/or the DNA simply degraded with time. Dr. Straub, in particular, deemed it "somewhat far-fetched and illogical" to suggest that all of the partial profiles DDC discovered came from people other than the biter. To conclude that one of the partial profiles DDC discovered belonged to the biter, however, one also must employ tenuous logic. That is because the three to five cells from 19.A.1 uncovered one major profile, and the ten cells from 19.A.2 uncovered a different major profile and at least one minor profile. The total amount of cells for each major profile, therefore, had to be very close in number. For one of those major profiles to have been the biter, that DNA would have had to either degrade at exactly the right pace or have been removed in exactly the right amount to make it mirror the transfer/contamination DNA attributable to the other partial profile(s) DDC found. It is no more illogical to conclude that all the partial profiles DDC discovered were from transfer/contamination DNA, than it is to conclude that degradation or cellular loss occurred to such a perfect degree. The former conclusion also comports with both Drs. Maddox and Benzinger's opinion that "[t]he presence of multiple low-level sources of DNA is most easily explained by incidental transfer."

As previously noted, there is no dispute that Prade was definitively excluded as the source of the partial male profiles that DNA testing uncovered. The problem is, if none of the partial male profiles came from the biter, that exclusion is meaningless. Having conducted a thorough review of the DNA results and the testimony interpreting those results, this Court cannot say with any degree of confidence that some of the DNA from the bite mark section belongs to Margo's killer. Likewise, we cannot say with absolute certainty that it does not.

For almost 15 years, the bite mark section of Margo's lab coat has been preserved and has endured exhaustive sampling and testing in the hopes of discovering the true identity of Margo's killer. The only absolute conclusion that can be drawn from the DNA results, however, is that their true meaning will never be known. A definitive exclusion result has been obtained, but its worth is wholly questionable. Moreover, that exclusion result must be taken in context with all of the other "available admissible evidence" related to this case. R.C. 2953.21(A)(1)(b); R.C. 2953.23(A)(2).

Prade, 2014-Ohio-1035, ¶113-120 (emphasis therein).

Thus, this Court concludes that the Y-STR DNA results are not material to the issues since there is not a strong probability that had the two partial male Y-STR DNA profiles been disclosed or available at trial the result of the trial would have been different. While the Y-STR DNA results are not cumulative as to the discovery of the two male partial DNA profiles, the results are cumulative as to the exclusion of the Defendant as a contributor to either of the partial profiles. In fact, the jury heard expert testimony at trial that DNA from an unknown third person was found on the bite mark of the lab coat and the jury still found the Defendant guilty of aggravated murder. The Defendant has failed to introduce any new evidence that the jury had not already considered during the 1998 trial.

OVERWHELMING "OTHER CIRCUMSTANTIAL EVIDENCE"

Finally, when analyzing the overwhelming other circumstantial evidence in this case, this Court is firmly convinced that when considering the Defendant's alleged motive, i.e. his financial problems, the impending divorce, his jealousy as evidenced by the taped conversations of Dr. Prade, as well as testimonial statements from Dr. Prade's acquaintances, the Defendant has failed to meet his burden of proving a strong probability exists that the eyewitness expert opinions, bite mark expert opinions and the Y-STR DNA test results would change the result if a new trial is granted. As succinctly stated by the Ninth District Court of Appeals:

“The amount of circumstantial evidence that the State presented at trial in support of Prade's guilt was overwhelming. The picture painted by that evidence was one of an abusive, domineering husband who became accustomed to a certain standard of living and who spiraled out of control after his successful wife finally divorced him, forced him out of the house, found happiness with another man, and threatened his dwindling finances. The evidence, while all circumstantial in nature, came from numerous, independent sources and provided answers for both the means and the motive for the murder.”

Prade, 2014-Ohio-1035, ¶121.

CONCLUSION

In conclusion, the Defendant has failed to demonstrate that the alleged new bite mark and eyewitness evidence establishes a strong probability that it would change the result (verdict) had it been available and/or presented at trial. From a review of the 2012 testimony “...each of the defense’s experts had critical things to say about the experts and eyewitnesses who testified at trial.” *Prade*, 2014-Ohio1035, ¶128.⁴ Therefore, this testimony is cumulative of the other testimony presented during the 1998 trial and, if introduced at a new trial, would merely impeach or contradict the evidence presented at the original trial. Furthermore, in considering all of the other evidence presented during the 1998 trial, this Court finds that the bite mark evidence was not the sole basis for the jury’s guilty verdicts. Therefore, the Defendant has failed to demonstrate a strong probability that the introduction of any “new” expert testimony regarding the bite mark and eye witness evidence would change the result (verdict) if a new trial was granted.

After analyzing the DNA evidence presented at the original criminal trial in 1998, this Court concludes the Defendant was excluded as the source of the DNA that was found on the three cuttings from the bite mark section of the lab coat.

⁴ The Court further noted that witness and expert credibility determinations and the weight to afford those determinations fall within the province of the jury as they are in the best position to weigh said issues. *Prade*, 2014-Ohio-1035, ¶112 & 128.

In analyzing the Y-STR test results post-trial, the bite mark area of the lab coat was the most focused on portion of the lab coat from the time of Margo Prade's death until 2012. The fact that the only male DNA found on the lab coat was near the bite mark and not anywhere else on the lab coat demonstrates that neither of the two partial male DNA profiles are that of the killer but more likely the product of incidental transfer and/or contamination, rendering those profiles meaningless.

In considering the significance of the above mentioned Y-STR DNA evidence, and strong probability that the existence of two partial male profiles is from incidental transfer and/or contamination in conjunction with the enormity of the remaining circumstantial evidence presented at the 1998 trial, this Court finds the Defendant has failed to demonstrate a strong probability that the introduction of the Y-STR DNA test results would change the result (verdict) if a new trial was granted.

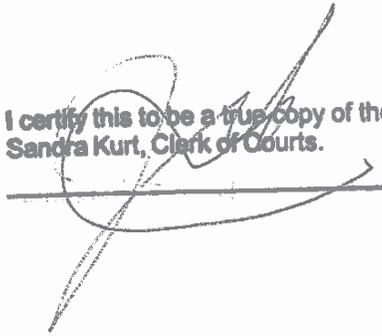
Based on the foregoing, the Defendant's Motion for New Trial is not well taken and is denied on all grounds.

IT SO ORDERED.


JUDGE CHRISTINE CROCE

cc: Attorney David Alden
Attorney Mark Godsey
Assistant Prosecutor Brad Gessner
Assistant Prosecutor Richard Kasay

I certify this to be a true copy of the original
Sandra Kurt, Clerk of Courts.


Deputy Clerk

SUMMIT COUNTY
2016 APR -7 AM 10:40

ORIGINAL

COURT OF APPEALS
SUMMIT COUNTY

2016 APR -7 AM 10:40

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

2016 APR -7 AM 10:58

SUMMIT COUNTY
CLERK OF COURTS

SUMMIT COUNTY
CLERK OF COURTS

STATE OF OHIO,

Plaintiff,

vs.

DOUGLAS PRADE,

Defendant

) Common Pleas Case No. CR 98 02-0463

)

)

) JUDGE CHRISTINE CROCE

)

)

)

) NOTICE OF APPEAL

)

)

28193

Now comes Defendant Douglas Prade, and hereby gives notice that he is appealing to the Ninth District Court of Appeals, Summit County, Ohio, from the final judgment entered in this action on March 11, 2016.

Dated: April 7, 2016

Respectfully submitted,



David Booth Alden (Ohio Bar No. 6,143)
Lisa B. Gates (Ohio Bar No. 40,392)
Emmett E. Robinson (Ohio Bar No. 88,537)
JONES DAY
North Point, 901 Lakeside Avenue
Cleveland, Ohio 44114
Phone: (216) 586-3939
Fax: (216) 579-0212
dbalden@jonesday.com
lgates@jonesday.com
erobinson@jonesday.com

Mark A. Godsey (Ohio Bar No. 74,484)
Brian C. Howe (Ohio Bar No. 86,517)
THE OHIO INNOCENCE PROJECT
University of Cincinnati College of Law
P. O. Box 210040
Cincinnati, Ohio 45220-0040
Phone: (513) 556-6805
Fax: (513) 556-2391
markgodsey@gmail.com
brianchurchhowe@gmail.com

*Attorneys for Defendant
Douglas Prade*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by U.S. mail and/or electronic mail this 7th day of April, 2016, to the following:

Richard Kasay
kasay@prosecutor.summitoh.net

Brad A. Gessner
gessner@prosecutor.summitoh.net

Gregory M. Peacock
peacock@prosecutor.summitoh.net

Summit County Prosecutor's Office
53 University Avenue
Akron, Ohio 44308

Attorneys for the State of Ohio



*An Attorney for Defendant
Douglas Prade*

In the Supreme Court of Ohio

STATE OF OHIO ex rel. DOUGLAS
PRADE,

Relator,

v.

NINTH DISTRICT COURT OF APPEALS

and

HON. JUDGE CHRISTINE CROCE,

Respondents.

Case No. 16-0686

Original Action for Writ of Prohibition

AGREED STATEMENT OF FACTS

David Booth Alden* (Ohio Bar #6,143)

* Counsel of Record

Lisa B. Gates (Ohio Bar #40,392)

Emmett E. Robinson (Ohio Bar #88,537)

Matthew R. Cushing (Ohio Bar #92,674)

JONES DAY

North Point, 901 Lakeside Avenue

Cleveland, Ohio 44114

Tel: (216) 586-3939; Fax: (216) 579-0212

dbalden@jonesday.com

lgates@jonesday.com

erobinson@jonesday.com

mcushing@jonesday.com

Mark A. Godsey (Ohio Bar #74,484)

Brian C. Howe (Ohio Bar #86,517)

THE OHIO INNOCENCE PROJECT

University of Cincinnati College of Law

P.O. Box 201140

Cincinnati, Ohio 45220-0040

Tel: (513) 556-6805; Fax: (513) 556-2391

markgodsey@gmail.com

brianchurchhowe@gmail.com

Counsel for Relator Douglas Prade

Michael DeWine (Ohio Bar #9,181)

Ohio Attorney General

Tiffany L. Carwile* (Ohio Bar #82,522)

* Counsel of Record

Sarah Pierce (Ohio Bar #87,799)

Ass't Ohio Attorneys General

Constitutional Offices Section

30 East Broad Street, 16th Floor

Columbus, Ohio 43215

Tel: (614) 466-2872; Fax: (614) 728-7592

tiffany.carwile@ohioattorneygeneral.gov

Counsel for Respondent

Ninth District Court of Appeals

Colleen M. Sims* (Ohio Bar #69,790)

* Counsel of Record

Heaven R. DiMartino (Ohio Bar #73,423)

Assistant Prosecuting Attorneys

53 University Avenue, 6th Floor

Akron, Ohio 44308

simsc@prosecutor.summitoh.net

Counsel for Respondent

Honorable Judge Christine Croce

PARTIES

1. Relator Douglas Prade is an individual currently incarcerated in the Allen Correctional Institution in Lima, Ohio.

2. Respondent Ninth District Court of Appeals (the “Ninth District”) is the appellate court for the Summit County Court of Common Pleas.

3. Respondent Honorable Judge Christine Croce (“Judge Croce”) is the judge on the Summit County Court of Common Pleas to whom Mr. Prade’s criminal case is assigned.

FACTS

A. Mr. Prade’s Trial and Conviction.

4. On September 24, 1998, a jury convicted Mr. Prade of aggravated murder, and the trial court sentenced him to life in prison.

5. The Ninth District affirmed Mr. Prade’s conviction. *State v. Prade*, 139 Ohio App.3d 676, 745 N.E.2d 475 (9th Dist. 2000), *appeal not accepted*, 90 Ohio St.3d 1490, 739 N.E.2d 816 (2000).

B. Post-Trial DNA Testing Post-Conviction Application.

6. On February 5, 2008, Mr. Prade filed a post-conviction application to have new DNA testing performed pursuant to Chapter 2953 of the Ohio Revised Code.

7. On June 2, 2008, the trial court denied Mr. Prade’s application for new DNA testing.

8. On February 18, 2009, the Ninth District affirmed the trial court’s order denying Mr. Prade’s application for new DNA testing. *State v. Prade*, 9th Dist. No. 24296, 2009-Ohio-704.

9. On May 4, 2010, this Court reversed and remanded for further proceedings. *State v. Prade*, 126 Ohio St.3d 27, 2010-Ohio-1842, 930 N.E.2d 287.

10. After remand, Mr. Prade's case was assigned to Judge Judy Hunter of the Summit County Court of Common Pleas.

C. Mr. Prade's Petition For Postconviction Relief Or, In The Alternative, Motion For A New Trial, And The Trial Court Order.

11. On July 2, 2012, Mr. Prade filed his Petition For Postconviction Relief Or, In The Alternative, Motion For A New Trial. The State filed a brief in response on July 24, 2012. Mr. Prade filed a reply memorandum on August 1, 2012.

12. In October 2012, Judge Hunter conducted a four-day evidentiary hearing on Mr. Prade's Petition For Postconviction Relief Or, In The Alternative, Motion For A New Trial. Mr. Prade waived his appearance at the hearing. Post-hearing briefs were filed by the State on December 3, 2012 and by Mr. Prade on December 4, 2012.

13. On January 29, 2013, Judge Hunter granted Mr. Prade's petition for post-conviction relief, overturned Mr. Prade's convictions, and ordered that he be discharged from prison. (Order On Defendant's Petition For Post-Conviction Relief Or Motion For New Trial, *State v. Prade*, Summit County Common Pleas No. CR 1998-02-0462 9 (Jan. 29, 2013) (the "Trial Court Order")).

14. In the Trial Court Order, Judge Hunter also granted Mr. Prade's motion for a new trial in the event that her order was reversed. (*Id.* at 21, 25).

D. The State's Appeal, the Ninth District's Reversal of the Grant of Postconviction Relief, and Other Proceedings Relating To The Trial Court Order.

15. On January 29, 2013, the State filed a notice of appeal from the grant of postconviction relief with the clerk of the trial court and clerk of the appellate court, which took the appeal as Ninth District Case No. 26775.

16. On March 19, 2014, the Ninth District reversed the grant of postconviction relief in the Trial Court Order and remanded for further proceedings consistent with its reversal. *State v. Prade*, 2014-Ohio-1035, 9 N.E.3d 1072, ¶ 131 (9th Dist.), *appeal not accepted*, 139 Ohio St.3d 1483, 2014-Ohio-3195, 12 N.E.3d 1229.

17. On March 19, 2014, Mr. Prade filed a notice of appeal in this Court seeking discretionary review of the Ninth District's decision reversing the Trial Court Order's grant of postconviction relief and a motion for a stay while this Court considered his request for discretionary review.

18. This Court granted Mr. Prade's motion for a stay. *State v. Prade*, 138 Ohio St.3d 1444, 2014-Ohio-1063, 5 N.E.3d 662 (Pfeifer, acting C.J.) (temporary stay); *State v. Prade*, 138 Ohio St.3d 1467, 2014-Ohio-1674, 6 N.E.3d 1203 (stay).

19. On April 17, 2014, while Mr. Prade's request for discretionary review was pending in this Court, the State filed a notice of appeal and accompanying motion for leave to appeal from the alternative ruling in the Trial Court Order granting Mr. Prade a new trial, which became Ninth District Case No. 27323.

20. On July 23, 2014, this Court denied discretionary review of the Ninth District's decision reversing the Trial Court Order's grant of postconviction relief. *State v. Prade*, 139 Ohio St.3d 1483, 2014-Ohio-3195, 12 N.E.3d 1229.

E. Mr. Prade's Incarceration and Subsequent Proceedings.

21. After this Court's July 23, 2014, ruling denying discretionary review, the case returned to the Summit County Court of Common Pleas where the case was assigned to Judge Croce.

22. On July 23, 2014, Judge Croce set the case for a status conference on July 25, 2014, and ordered that Mr. Prade be present at the status conference.

23. At the July 25, 2014, status conference, Judge Croce ordered that Mr. Prade be reincarcerated, and Mr. Prade was taken into custody.

24. Mr. Prade has been incarcerated since July 25, 2014.

25. On August 14, 2014, the Ninth District dismissed the State's appeal from Judge Hunter's ruling in the Trial Court Order granting Mr. Prade a new trial, finding that Judge Hunter's order granting Mr. Prade's motion for a new trial was a contingent, interlocutory order that the trial court—now Judge Croce—could reconsider. (Journal Entry, *State v. Prade*, 9th Dist. Case No. 27323 (Aug. 14, 2014)).

26. In November 2015, Judge Croce conducted a two-day evidentiary hearing on Mr. Prade's new trial motion that Judge Hunter had granted conditionally in the Trial Court Order filed on January 29, 2013.

27. On March 11, 2016, Judge Croce issued an order denying Mr. Prade's motion for a new trial. (Order on Defendant's Motion for New Trial, *State v. Prade*, Summit County Common Pleas Case No. CR 1998-02-0463 (Mar. 11, 2016)).

28. On April 7, 2016, Mr. Prade filed a notice of appeal from Judge Croce's March 11, 2016, order denying his motion for a new trial in the Ninth District.

29. Mr. Prade's appeal from Judge Croce's March 11, 2016, order denying his motion for a new trial currently is pending before the Ninth District as Ninth District Case No. 28193.

Dated August 16, 2016

Respectfully submitted,

/s/Tiffany L. Carwile (by permission)
Michael DeWine (Ohio Bar #9,181)
Ohio Attorney General
Tiffany L. Carwile* (Ohio Bar #82,522)
* Counsel of Record
Sarah Pierce (Ohio Bar #87,799)
Ass't Ohio Attorneys General
Constitutional Offices Section
30 East Broad Street, 16th Floor
Columbus, Ohio 43215
Tel: (614) 466-2872; Fax: (614) 728-7592
tiffany.carwile@ohioattorneygeneral.gov

*Counsel for Respondent
Ninth District Court of Appeals*

/s/ Colleen M. Sims (by permission)
Colleen M. Sims* (Ohio Bar #69,790)
* Counsel of Record
Heaven R. DiMartino (Ohio Bar #73,423)
Assistant Prosecuting Attorneys
53 University Avenue, 6th Floor
Akron, Ohio 44308
simsc@prosecutor.summitoh.net

*Counsel for Respondent
Honorable Judge Christine Croce*

Emmett E. Robinson
David Booth Alden* (Ohio Bar #6,143)
* Counsel of Record
Lisa B. Gates (Ohio Bar No. #40,392)
Emmett E. Robinson (Ohio Bar #88,537)
Matthew R. Cushing (Ohio Bar #92,674)
JONES DAY
North Point, 901 Lakeside Avenue
Cleveland, OH 44114
Telephone: (216) 586-3939
Facsimile: (216) 579-0212
dbalden@jonesday.com
lgates@jonesday.com
erobinson@jonesday.com
mcushing@jonesday.com

Mark A. Godsey (Ohio Bar #74,484)
Brian C. Howe (Ohio Bar #86,517)
THE OHIO INNOCENCE PROJECT
University of Cincinnati College of Law
P.O. Box 201140
Cincinnati, Ohio 45220-0040
Telephone: (513) 556-6805
Facsimile: (513) 556-2391
markgodsey@gmail.com
brianchurchhowe@gmail.com

Counsel for Relator Douglas Prade

REVISED CODE 1.47

Presumptions in enactment of statutes.

In enacting a statute, it is presumed that:

- (A) Compliance with the constitutions of the state and of the United States is intended;
- (B) The entire statute is intended to be effective;
- (C) A just and reasonable result is intended;
- (D) A result feasible of execution is intended.

Effective Date: 01-03-1972

REVISED CODE 2505.03

Appeal of final order, judgment, or decree.

(A) Every final order, judgment, or decree of a court and, when provided by law, the final order of any administrative officer, agency, board, department, tribunal, commission, or other instrumentality may be reviewed on appeal by a court of common pleas, a court of appeals, or the supreme court, whichever has jurisdiction.

(B) Unless, in the case of an administrative-related appeal, Chapter 119. or other sections of the Revised Code apply, such an appeal is governed by this chapter and, to the extent this chapter does not contain a relevant provision, the Rules of Appellate Procedure. When an administrative-related appeal is so governed, if it is necessary in applying the Rules of Appellate Procedure to such an appeal, the administrative officer, agency, board, department, tribunal, commission, or other instrumentality shall be treated as if it were a trial court whose final order, judgment, or decree is the subject of an appeal to a court of appeals or as if it were a clerk of such a trial court.

(C) An appeal of a final order, judgment, or decree of a court shall be governed by the Rules of Appellate Procedure or by the Rules of Practice of the Supreme Court, whichever are applicable, and, to the extent not in conflict with those rules, this chapter.

Effective Date: 03-17-1987

REVISED CODE 2945.67

Appeal by state by leave of court.

(A) A prosecuting attorney, village solicitor, city director of law, or the attorney general may appeal as a matter of right any decision of a trial court in a criminal case, or any decision of a juvenile court in a delinquency case, which decision grants a motion to dismiss all or any part of an indictment, complaint, or information, a motion to suppress evidence, or a motion for the return of seized property or grants post conviction relief pursuant to sections [2953.21](#) to [2953.24](#) of the Revised Code, and may appeal by leave of the court to which the appeal is taken any other decision, except the final verdict, of the trial court in a criminal case or of the juvenile court in a delinquency case. In addition to any other right to appeal under this section or any other provision of law, a prosecuting attorney, city director of law, village solicitor, or similar chief legal officer of a municipal corporation, or the attorney general may appeal, in accordance with section [2953.08](#) of the Revised Code, a sentence imposed upon a person who is convicted of or pleads guilty to a felony.

(B) In any proceeding brought pursuant to division (A) of this section, the court, in accordance with Chapter 120. of the Revised Code, shall appoint the county public defender, joint county public defender, or other counsel to represent any person who is indigent, is not represented by counsel, and does not waive the person's right to counsel.

Effective Date: 07-01-1996

REVISED CODE 2953.23

Post conviction relief petition - time for filing.

(A) Whether a hearing is or is not held on a petition filed pursuant to section 2953.21 of the Revised Code, a court may not entertain a petition filed after the expiration of the period prescribed in division (A) of that section or a second petition or successive petitions for similar relief on behalf of a petitioner unless division (A)(1) or (2) of this section applies:

(1) Both of the following apply:

(a) Either the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, or, subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right.

(b) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence.

(2) The petitioner was convicted of a felony, the petitioner is an offender for whom DNA testing was performed under sections 2953.71 to 2953.81 of the Revised Code or under former section 2953.82 of the Revised Code and analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of section 2953.74 of the Revised Code, and the results of the DNA testing establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death.

As used in this division, "actual innocence" has the same meaning as in division (A)(1)(b) of section 2953.21 of the Revised Code, and "former section 2953.82 of the Revised Code" has the same meaning as in division (A)(1)(c) of section 2953.21 of the Revised Code.

(B) An order awarding or denying relief sought in a petition filed pursuant to section [2953.21](#) of the Revised Code is a final judgment and may be appealed pursuant to Chapter 2953. of the Revised Code.

Amended by 128th General Assembly File No.30, SB 77, §1, eff. 7/6/2010.

Effective Date: 10-29-2003; 07-11-2006

OHIO CONSTITUTION – ARTICLE I, § 2

Right to alter, reform, or abolish government, and repeal special privileges

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly.

OHIO CONSTITUTION – ARTICLE I, § 10

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

(As amended September 3, 1912.)

OHIO CONSTITUTION, ARTICLE IV, § 3

Court of appeals

(A) The state shall be divided by law into compact appellate districts in each of which there shall be a court of appeals consisting of three judges. Laws may be passed increasing the number of judges in any district wherein the volume of business may require such additional judge or judges. In districts having additional judges, three judges shall participate in the hearing and disposition of each case. The court shall hold sessions in each county of the district as the necessity arises. The county commissioners of each county shall provide a proper and convenient place for the court of appeals to hold court.

(B)(1) The courts of appeals shall have original jurisdiction in the following:

- (a) Quo warranto;
- (b) Mandamus;
- (c) Habeas corpus;
- (d) Prohibition;
- (e) Procedendo;
- (f) In any cause on review as may be necessary to its complete determination.

(2) Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district, except that courts of appeals shall not have jurisdiction to review on direct appeal a judgment that imposes a sentence of death. Courts of appeals shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.

(3) A majority of the judges hearing the cause shall be necessary to render a judgment. Judgments of the courts of appeals are final except as provided in section 2(B)(2) of this article. No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause.

(4) Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

(C) Laws may be passed providing for the reporting of cases in the courts of appeals.

(As amended Nov. 8, 1994)

UNITED STATES CONSTITUTION – AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION – AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the [male](#) inhabitants of such state, [being twenty-one years of age](#), and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

**Revised Code 3937.18 (as amended in
Am.Sub.S.B. No. 20, 145 Ohio Laws, Part I, 204) (superceded)**

UNINSURED AND UNDERINSURED MOTORIST COVERAGE

(A) No automobile liability or motor vehicle liability policy of insurance insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless both of the following coverages are provided to persons insured under the policy for loss due to bodily injury or death suffered by such persons:

(1) Uninsured motorist coverage, which shall be in an amount of coverage equivalent to the automobile liability or motor vehicle liability coverage and shall provide protection for bodily injury or death under provisions approved by the superintendent of insurance, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, suffered by any person insured under the policy.

For purposes of division (A)(1) of this section, a person is legally entitled to recover damages if he is able to prove the elements of his claim that are necessary to recover damages from the owner or operator of the uninsured motor vehicle. The fact that the owner or operator of the uninsured motor vehicle has an immunity, whether based upon a statute or the common law, that could be raised as a defense in an action brought against him by the person insured under uninsured motorist coverage does not affect the insured person's right to recover under his uninsured motorist coverage.

(2) Underinsured motorist coverage, which shall be in an amount of coverage equivalent to the automobile liability or motor vehicle liability coverage and shall provide protection for an insured against loss for bodily injury, sickness, or disease, including death, suffered by any person insured under the policy, where the limits of coverage available for payment to the insured under all bodily injury liability bonds and insurance policies covering persons liable to the insured are less than the limits for the insured's uninsured motorist coverage. Underinsured motorist coverage is not and shall not be excess insurance to other applicable liability coverages, and shall be provided only to afford the insured an amount of protection not greater than that which would be available under the insured's

uninsured motorist coverage if the person or persons liable were uninsured at the time of the accident. The policy limits of the underinsured motorist coverage shall be reduced by those amounts available for payment under all applicable bodily injury liability bonds and insurance policies covering persons liable to the insured.

(B) Coverages offered under division (A) of this section shall be written for the same limits of liability. No change shall be made in the limits of one of these coverages without an equivalent change in the limits of the other coverage.

(C) The named insured may only reject or accept both coverages offered under division (A) of this section. The named insured may require the issuance of such coverages for bodily injury or death in accordance with a schedule of optional lesser amounts approved by the superintendent, that shall be no less than the limits set forth in section 4509.20 of the Revised Code for bodily injury or death. Unless the named insured requests such coverages in writing, such coverages need not be provided in or supplemental to a renewal policy where the named insured has rejected the coverages in connection with a policy previously issued to him by the same insurer. If the named insured has selected uninsured motorist coverage in connection with a policy previously issued to him by the same insurer, such coverages offered under division (A) of this section need not be provided in excess of the limits of the liability previously issued for uninsured motorist coverage, unless the named insured requests in writing higher limits of liability for such coverages.

(D) For the purpose of this section, a motor vehicle is uninsured if the liability insurer denies coverage or is or becomes the subject of insolvency proceedings in any jurisdiction.

(E) In the event of payment to any person under the coverages required by this section and subject to the terms and conditions of such coverages, the insurer making such payment to the extent thereof is entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury or death for which such payment is made, including any amount recoverable from an insurer which is or becomes the subject of insolvency proceedings, through such proceedings or in any other lawful manner. No insurer shall attempt to recover any amount against the insured of an insurer which is or

becomes the subject of insolvency proceedings, to the extent of his rights against such insurer which such insured assigns to the paying insurer.

(F) The coverages required by this section shall not be made subject to an exclusion or reduction in amount because of any workers' compensation benefits payable as a result of the same injury or death.

(G) Any automobile liability or motor vehicle liability policy of insurance that includes coverages offered under division (A) of this section may, without regard to any premiums involved, include terms and conditions that preclude any and all stacking of such coverages, including but not limited to:

(1) Interfamily stacking, which is the aggregating of the limits of such coverages by the same person or two or more persons, whether family members or not, who are not members of the same household;

(2) Intrafamily stacking, which is the aggregating of the limits of such coverages purchased by the same person or two or more family members of the same household.

(H) Any automobile liability or motor vehicle liability policy of insurance that includes coverages offered under division (A) of this section and that provides a limit of coverage for payment for damages for bodily injury, including death, sustained by any one person in any one automobile accident, may, notwithstanding Chapter 2125. of the Revised Code, include terms and conditions to the effect that all claims resulting from or arising out of any one person's bodily injury, including death, shall collectively be subject to the limit of the policy applicable to bodily injury, including death, sustained by one person, and, for the purpose of such policy limit shall constitute a single claim. Any such policy limit shall be enforceable regardless of the number of insureds, claims made, vehicles or premiums shown in the declarations or policy, or vehicles involved in the accident.

(I) Nothing in this section shall prohibit the inclusion of underinsured motorist coverage in any uninsured motorist coverage provided in compliance with this section.

History: 1994 S 20, eff. 10-20-94; 1987 H 1, eff. 1-5-88; 1986 S 249; 1982 H 489; 1980 H 22; 1976 S 545; 1975 S 25; 1970 H 620; 132 v H 1; 131 v H 61.

11 United States Code § 1142

Implementation of plan

(a) Notwithstanding any otherwise applicable nonbankruptcy law, rule, or regulation relating to financial condition, the debtor and any entity organized or to be organized for the purpose of carrying out the plan shall carry out the plan and shall comply with any orders of the court.

(b) The court may direct the debtor and any other necessary party to execute or deliver or to join in the execution or delivery of any instrument required to effect a transfer of property dealt with by a confirmed plan, and to perform any other act, including the satisfaction of any lien, that is necessary for the consummation of the plan.

History: (Nov. 6, 1978, [P.L. 95-598](#), Title I, § 101, [92 Stat. 2639](#); July 10, 1984, [P.L. 98-353](#), Title III, Subtitle H, § 514(a), (c), (d), [98 Stat. 387](#).)

18 United States Code Appendix § 1202 (repealed)

- (a) Any person who – (1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, or (2) has been discharged from the Armed Forces under dishonorable discharge, or (3) has been adjudged by a court of the United States or of a State or any political subdivision thereof of being mentally incompetent, or (4) having been a citizen of the United States has renounced his citizenship, or (5) being an alien is illegally or unlawfully in the United States, and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than \$10,000 or imprisoned for not more than two years, or both.
- (b) Any individual who to his knowledge and while being employed by any person who – (1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, or (2) has been discharged from the Armed Forces under other than honorable discharge, or (3) has been adjudged by a court of the United States or of a State or any political subdivision thereof of being mentally incompetent, or (5) being an alien is illegally or unlawfully in the United States, and who, in the course of such employment, receives, possesses, or transports in commerce or affecting commerce, after the date of the enactment of this Act, any firearm shall be fined not more than \$10,000 or imprisoned for not more than two years, or both.
- (c) As used in this title – (1) “commerce” means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country; (2) “felony” means any offense punishable by imprisonment for a term exceeding one year; (3) “firearm” means any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; or any firearm muffler or firearm silencer; or any destructive device. Such term shall include any handgun, rifle, or shotgun; (4) “destructive device” means any explosive, incendiary, or poison gas bomb, grenade, mine, rocket, missile, or similar device; and includes any type of weapon which will or is designed to or may readily be converted to expel a projectile by the action of any explosive and having any barrel with a bore of one-half inch or more in diameter; (5) “handgun” means any pistol or revolver originally designed to be fired by the use of a single hand and which is designed to fire or capable of firing fixed cartridge ammunition, or any other firearm originally designed to be fired by the use of a single hand; (6) “shotgun” means a weapon designed or redesigned, made or remade, and intended

to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger; (7) "rifle" means a weapon designed or redesigned, made or remad, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed metallic cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger.

18 United States Code § 2259

Mandatory restitution

(a) In general. Notwithstanding section 3663 or 3663A [[18 USCS § 3663](#) or [3663A](#)], and in addition to any other civil or criminal penalty authorized by law, the court shall order restitution for any offense under this chapter [[18 USCS §§ 2251](#) et seq.].

(b) Scope and nature of order.

(1) Directions. The order of restitution under this section shall direct the defendant to pay the victim (through the appropriate court mechanism) the full amount of the victim's losses as determined by the court pursuant to paragraph (2).

(2) Enforcement. An order of restitution under this section shall be issued and enforced in accordance with section 3664 [[18 USCS § 3664](#)] in the same manner as an order under section 3663A [[18 USCS § 3663A](#)].

(3) Definition. For purposes of this subsection, the term "full amount of the victim's losses" includes any costs incurred by the victim for--

- (A) medical services relating to physical, psychiatric, or psychological care;
- (B) physical and occupational therapy or rehabilitation;
- (C) necessary transportation, temporary housing, and child care expenses;
- (D) lost income;
- (E) attorneys' fees, as well as other costs incurred; and
- (F) any other losses suffered by the victim as a proximate result of the offense.

(4) Order mandatory.

(A) The issuance of a restitution order under this section is mandatory.

(B) A court may not decline to issue an order under this section because of--

- (i) the economic circumstances of the defendant; or
- (ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source.

(c) Definition. For purposes of this section, the term "victim" means the individual harmed as a result of a commission of a crime under this chapter [[18 USCS §§ 2251](#) et seq.], including, in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, but in no event shall the defendant be named as such representative or guardian.

History: Added Sept. 13, 1994, [P.L. 103-322](#), Title IV, Subtitle A, Ch 1, § 40113(b)(1), [108 Stat. 1907](#); April 24, 1996, [P.L. 104-132](#), Title II, Subtitle A, § 205(c), [110 Stat. 1231](#).